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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72- 72-462

FORD MOTOR COMPANY,

Petitioner,

—v.—

MAURIZIO D. FORTUNATO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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No. 72-

FORD MOTOR COMPANY,

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—v.—

MAURIZIO D. FORTUNATO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Ford Motor Company, the defendant below, respectfully prays that a writ of certiorari issue to review the decision rendered by the United States Court of Appeals for the Second Circuit (Kaufman and Anderson, *JJ.*, with Mansfield, *J.*, dissenting) on July 10, 1972, which affirmed a judgment of $400,000 for plaintiff after a trial before Neaher, *J.*, and a jury in the United States District Court for the Eastern District of New York.

Opinions Below

The opinions delivered in the Court of Appeals are not yet officially reported, and are set forth in Appendix A (1a-28a). No opinion was rendered in the District Court.

Jurisdiction

The judgment of the Court of Appeals, dated and entered July 10, 1972, is set forth in Appendix B (29a). Petitioner's petition for rehearing and suggestion for rehearing in banc were denied by orders dated August 17, 1972, which are set forth in Appendixes C and D (30a-31a).

The jurisdiction of this Court to review the judgment of the Court of Appeals is conferred by 28 U.S.C. §§ 1254(1), 2101(c), and is sustained by *New York Central R.R.* v. *Johnson*, 279 U.S. 310, 312-13 (1929).

Questions Presented

1. May a jury verdict be allowed to stand where plaintiff's counsel on summation, without any supporting proof and over defendant's objections, stressed that defendant is a large corporation with many employees, and asked that defendant be punished because of its supposed interest in profit at the expense of safety?

2. May the prejudicial impact of such a summation be cured by generalized, abstract instructions after the District Court has failed to admonish offending counsel or to direct the jury immediately and plainly to disregard the improper summation?

3. Are corporations, as a matter of equal protection and due process of law, entitled to protection from deliberately aroused prejudice based solely on their size and profitability just as individuals are protected from prejudice based upon insurance protection, race, and other irrelevant characteristics?

If certiorari is granted, petitioner also wishes to present two further questions to the Court:

4. May the Court of Appeals disregard the erroneous exclusion of crucial lines of evidence simply because of the absence of detailed offers of proof, where the significance of the excluded questions was obvious?

5. Should not a verdict be directed for a defendant whose uncontroverted physical tests completely disproved plaintiff's theory of the case?

Statement

Plaintiff brought this action against defendant for injuries suffered when his 1967 Ford Mustang automobile was destroyed by fire after colliding with a bridge abutment just after midnight on July 8, 1967. The jurisdiction of the District Court was founded on diversity of citizenship.* 28 U.S.C. § 1332(a)(2).

The cause of the accident was sharply disputed. Plaintiff claimed that it was caused by defects in the manufacture and design of the Mustang's gasoline tank, which permitted gasoline vapors to diffuse through a minute pinhole in the top of the gas tank into the passenger compartment where, plaintiff claimed, they exploded when he attempted to use the cigarette lighter just before he entered the S-turn leading off the bridge. Defendant contended that the accident happened because the partially intoxicated plaintiff failed to negotiate the second half of the unfamiliar S-turn, crashed into both its walls in turn,

* Plaintiff is a resident of New York and defendant is a Delaware corporation with its principal place of business in Michigan.

ruptured the bottom of the gas tank, and thus caused the ignition of the escaping gasoline.

Plaintiff's counsel stressed early in his summation that defendant is a large corporation with thousands of employees:

> "I would like you to bear in mind that we are dealing here with The Ford Motor Company which has at its disposal, as one witness said, and I forget the exact number, thousands of engineers in all phases of automotive engineering, thousands of them." (35a.*)

He concluded his summation with an outright appeal for punishment on his completely unsupported charge that defendant had sacrificed safety for profits:

> "Let me say this in closing:
>
> What could Ford have done to avoid all of this suffering?
>
> Let me tell you what Ford could have done:
>
> No. 1, is the obvious one, they could have used the trunk tank design that General Motors or Chrysler used so that this couldn't happen.
>
> [Defense counsel]: There is no such proof that Chrysler or General Motors used a different type of tank.
>
> The Court: As I said, Mr. Conway, the jury—
>
> [Defense counsel]: It is an unfair statement.
>
> [Plaintiff's counsel]: Well, his own witness said so, for heaven's sake, his own witness said so and used to work for Chrysler and General Motors, he said they used essentially the same type thing, that this tank was adopted as a warmed-over design from the old

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* The summation of plaintiff's counsel is set forth in Appendix E (32a-80a).

Falcon. He didn't want to admit that at first, I had to read it and he conceded that the Ford Company did admit that it is a warmed-over design from the 1960 Falcon.

I wonder why Ford insisted on using this, it certainly wasn't because it is safer.

I think there is only one obvious answer:

It's to save money.

[Defense counsel]: There is no proof of that either, I submit.

[Plaintiff's counsel]: It is a fair inference, Your Honor.

The Court: It is fair comment.

[Plaintiff's counsel]: Thank you.

Obviously if you can use one piece of metal for two uses, two purposes, you are going to save a few pennies. Maybe even a few dollars, I don't know.

So the consideration for Ford was not safety of the public, it was profit. A little more profit makes for happy stockholders." (76a-77a.)

* * * *

"I am telling you in closing only one thing.

It is apparent to me that The Ford Motor Company is somewhat more interested in fact in profit rather than the public safety, and I tell you this cannot continue and I think it is about time the customer had a few rights and I would like The Ford Motor Company to be a little more careful, if this is hazardous not to consider a profit over safety.

And I say to you if you feel that way about this design, you let The Ford Motor Company know it and let them know—

[Defense counsel]: I think this is way, far beyond the realm of any sort of comment.

The Court: I think you have concluded, you have concluded?

> [Plaintiff's counsel]: I have just a little more. If you feel that way about this design, you let them know it and you let them know it loud and clear. Thank you." (78a-79a.)

These prejudicial references were no accidental or spontaneous outburst. Against the irrelevant background of defendant's size and profitability, plaintiff's counsel was permitted to engage in exhaustive, deliberately contrived, unsupported speculation that defendant used an outside metallurgical expert because he was the only witness who would "go along" with defendant's hypothesis (36a-39a); that its other witnesses were guilty of distortion and suppression (46a-55a); and that it willfully failed to introduce production records which actually were not in existence and which had not even been mentioned at trial (49a). He even sought an adverse inference from the lack of testimony justifying defendant's gas tank design which had in fact been excluded on plaintiff's objection (55a), arguing that it was "obvious" that defendant had adopted the design "to save money" (76a). Instead of striking this wholly unfounded argument, the District Court actually termed it "fair comment" (*ibid.*). Having been permitted to arrest the jury with these unsupported charges, plaintiff's counsel then was permitted to assert an equally unsupported "explanation" of his own failure to produce for pretrial examination by the defendant or at the trial the piece of metal which contained the alleged pinhole in the top of the gas tank, suggesting that it had been lost in his busy law office (39a-40a).*

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* At trial one of plaintiff's experts testified that he had found the pinhole in the top of the gas tank six months after the accident (R. 320a-321a), and plaintiff's metallurgist testified that he took

Defense counsel objected to this unsupported explanation (39a-40a). He also objected to the groundless charge that the purpose of the gas tank design was to save money, and to the concluding request for punishment (76a, 79a). The trial court did not admonish plaintiff's counsel or tell the jury in plain terms to disregard counsel's unproven statements. As to the gratuitous explanation for the claimed loss of the piece of metal, the Court merely repeated a standardized plague-on-both-your-houses statement that the jury was not bound by unsupported factual arguments.* It did not characterize plaintiff's counsel's statement as unsupported. It improperly left that question to the jury's unguided recollection:

> "The jury will be told again to disregard statements of counsel with respect to whether or not the facts they ask you to draw are facts." (40a.)

As to the charge that the gas tank was designed to save money at the expense of safety, the Court said that this

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microphotographs of the alleged pinhole which in his opinion showed that it was caused by a defect in manufacture (R. 197a-210a). ("R." citations are to the Appendix in the Court of Appeals, which contains the entire trial record.) Plaintiff offered no testimony to explain the nonproduction of the pinhole, although his metallurgist testified on cross-examination that he returned the pinhole to plaintiff's counsel and volunteered, "I understand that it has been lost" (R. 247a).

Defendant's metallurgist testified that, while he could not determine from the microphotographs themselves what they showed (R. 509a, 520a), accepting the testimony of plaintiff's metallurgist that they showed a corroded pinhole in a steel plate, the pinhole was caused by corrosion, not by a defect in manufacture (R. 485a-486a, 491a-492a). The car had been kept after the accident in various garages and lots, much of the time in the open, and the gas tank admittedly had extensive rust deposits, including the area around the hole (R. 184a, 275a).

* The Court made this statement five times during the summation of plaintiff's counsel alone (40a, 41a, 49a, 55a, 76a).

was fair comment (76a) even though it had excluded proof as to the merits of the design (R. 592a-593a).

As to counsel's emotional appeal for punishment, the Court never told the jury that it was improper. To the jury the Court's half-hearted intervention, "I think you have concluded, you have concluded?" could only have meant that the Court tacitly accepted the appeal for punishment but did not want it unduly labored. Not until responding to requests to charge—after the luncheon recess and following the charge proper—did the Court give a generalized charge that "[y]ou are not to base an award of damages on any theory of punishing either of the parties or for any supposed act or omission" (R. 705a).

In affirming the judgment for plaintiff, the majority of the Court of Appeals held that counsel's appeal to the jury to believe his unsworn testimony about the missing pinhole was improper (14a-15a) but "was not so substantial as to warrant an order for a new trial" (15a), and that the appeal for punishment could be overlooked because "this court cannot say that the verdict, though high, was excessive or resulted from sympathy or an intent to punish Ford" (16a). Judge Mansfield dissented forcefully from the majority's conclusion that plaintiff's misconduct in summation was harmless (23a-26a).

Reasons For Granting The Writ

1. The Summation of Plaintiff's Counsel Was Flagrantly Improper

Having first emphasized the size and resources of the defendant, this image of the company colored each of the succeeding themes developed by plaintiff's summation—all

of them calculated—all of them improper. The false unsupported claim of suppression and distortion of evidence, the lame and unsupported explanation for the loss of the critical piece of physical evidence, the highly emotional and inflammatory plea for punishment, all took on added force against the counterpoise of defendant's size and profitability. As Judge Learned Hand said of the summation condemned in *Brown* v. *Walter*, 62 F.2d 798, 799 (2d Cir. 1933),

> "Nobody can read the summation without being satisfied that the real issues were being suppressed, and the picture substituted of an alien and malevolent corporation, lurking in the background and contriving a perjurious defense."

2. The District Court Should Have Admonished Plaintiff's Counsel and Immediately and Plainly Directed the Jury to Disregard the Improper Summation

The most prejudicial portions of plaintiff's summation were the subject of prompt objection. The District Court did not sustain these objections. Neither did it admonish plaintiff's counsel. Neither did it immediately and plainly instruct the jury that the words it had just heard were unsupported and improper and should be completely disregarded. Instead, the District Court temporized by giving stock, impartial, abstract instructions which left it to the jury to puzzle out their application, and twice permitted plaintiff's counsel to go on to emphasize the very point he had been making when defense counsel objected.

The affirmance of the judgment by a majority of the Court of Appeals epitomizes a widespread misunderstanding of the District Court's duty when faced with an improper and prejudicial summation, which this Court should

grant certiorari to correct. The Court of Appeals majority excused the District Court's failure to admonish plaintiff's counsel and clearly instruct the jury to disregard the improprieties on the ground that the generalized statements of the District Court cured the prejudice to defendant.* Other Courts of Appeals, including the court below on other occasions, have held that the District Court must intervene immediately, plainly, and decisively in order to remove the prejudice. *E.g.*, *Koufakis* v. *Carvel*, 425 F.2d 892, 904-05 (2d Cir. 1970); *Pingatore* v. *Montgomery Ward & Co., Inc.*, 419 F.2d 1138, 1142-43 (6th Cir. 1969), *cert. denied*, 398 U.S. 928 (1970); *Brown* v. *Walter*, 62 F.2d 798, 799-800 (2d Cir. 1933).

This Court has repeatedly held that the District Court must react immediately to eradicate the prejudicial effect of an improper summation. In *Wilson* v. *United States*,

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* The reasons given by the majority of the Court of Appeals for this conclusion are clearly erroneous. (1) The majority noted that the District Court instructed the jury that it could draw an inference against plaintiff if it found that the nonproduction of the pinhole was intentional (15a). But it was anticipation of this very charge that made it essential for plaintiff's counsel to get some explanation for the nonproduction before the jury, and magnifies the prejudice resulting from his success. (2) The majority stated that defendant was not prejudiced by the nonproduction of the pinhole because plaintiff produced what his witness said were microphotographs of it (16a). Even if this were the case, it would not negate the prejudicial effect of the summation, which was to suggest that the nonproduction was not intentional; but in any event, as defense counsel pointed out (R. 202a), defendant had no way of knowing whether the microphotographs represented the alleged pinhole or did so accurately, and defendant's expert simply had to assume that they represented a corroded pinhole in steel (R. 509a, 520a). (3) Finally, the majority stated that "this court cannot say that the verdict, though high, was excessive or resulted from sympathy or an intent to punish Ford" (16a). This misses the point. Defendant contested liability, not damages. A fair trial, free from prejudice, might well have resulted in a verdict in defendant's favor.

149 U.S. 60, 67 (1893), where the District Court temporized with an oblique reference by the prosecutor in summation to the defendant's failure to testify, the Court said:

> "By this action of the court in refusing to condemn the language of the District Attorney, and to express to the jury in emphatic terms that they should not attach to the failure any importance whatever as a presumption against the defendant, the impression was left on the minds of the jury that if he were an innocent man he would have gone on the stand as the District Attorney stated he himself would have done."

In *Hall* v. *United States*, 150 U.S. 76, 81 (1893), the Court held that the prosecutor's reference in summation to a different and unproved murder "was a breach of professional and official duty, which, upon the defendant's protest, should have been rebuked by the court, and the jury directed to allow it no weight." Again, Justice (later Chief Justice) Stone wrote for the Court in *New York Central R.R.* v. *Johnson*, 279 U.S. 310, 318 (1929), that

> "The failure of the trial judge to sustain petitioner's objection or otherwise to make certain that the jury would disregard the appeal, could only have left them with the impression that they might properly be influenced by it in rendering their verdict, and thus its prejudicial effect was enhanced."

And in *Berger* v. *United States*, 295 U.S. 78, 85 (1935), the Court held that the trial court's response to prejudicial questions and summations by the prosecution had been wanting:

> "The trial judge, it is true, sustained objections to some of the questions, insinuations and misstate-

> ments, and instructed the jury to disregard them. But the situation was one which called for stern rebuke and repressive measures and, perhaps, if these were not successful, for the granting of a mistrial. It is impossible to say that the evil influence upon the jury of these acts of misconduct was removed by such mild judicial action as was taken."

Finally, in *Viereck* v. *United States*, 318 U.S. 236, 248 (1943), a prosecution for failure to register as a German agent, the Court held that the prosecutor's appeal to wartime passions was improper, stating:

> "We think that the trial judge should have stopped counsel's discourse without waiting for an objection."

A fortiori in this case, where the most prejudicial parts of the summation of plaintiff's counsel were the subject of specific objections, the District Court should have taken immediate action to stop plaintiff's counsel and eradicate the prejudice.

3. The Court of Appeals Applied an Improper Standard for Appellate Review

The Court of Appeals in this case applied an improper standard for review: "this court cannot say that the verdict, though high, was excessive or resulted from sympathy or an intent to punish Ford" (16a). Defendant had no such burden of proof. Rather, it was the plaintiff who, having undeniably engaged in a foul appeal to emotion and prejudice, had the burden to satisfy the appellate court that this appeal *could not* have been harmful. *See, e.g., Berger* v. *United States*, 295 U.S. 78, 85, 89 (1935); *Beck* v. *Wings*

Field, Inc., 122 F.2d 114, 116-17 (3d Cir. 1941). Obviously, if plaintiff actually believed the appeal was harmless, he would not have indulged in it. Plaintiff's counsel knew, and the Court knew, that such an appeal was highly inflammatory. Such an appeal can have no justification, particularly when it was part and parcel of a continuous, calculated summation effort which avoided the facts in controversy and substituted in succession one unsupported prejudicial attack after another.

4. To Condone Irrelevant Appeals to Prejudice Against Large Corporations Would Be Unconstitutionally Discriminatory

The summation of plaintiff's counsel was a clear appeal to the prejudice against large corporations. Such an appeal has no place in a trial, which should be cleanly restricted to the questions of fact necessary to a resolution of the issues before the court. The size of a corporation is something which is blameless and which it cannot change, just as an individual's race is something which is blameless and which he cannot change. It is not a proper subject for summation. This Court has stated that such "appeals to class prejudice are highly improper and cannot be condoned and trial courts should ever be alert to prevent them." *United States* v. *Socony-Vacuum Oil Co., Inc.*, 310 U.S. 150, 239 (1940). The courts long ago held that it is reversible error, *per se*, to suggest that the defendant is protected by insurance. *E.g., Brown* v. *Walter*, 62 F.2d 798, 799-800 (2d Cir. 1933). This prophylactic rule should be equally applicable to prejudicial references to corporate size and profits.

Certiorari should be granted in this case to make clear

that such appeals to prejudice against large corporations do not enjoy a privileged position in the federal courts. If the defendant in this case had been an individual rather than a corporation, and if the attack had been upon his race or some other irrelevant characteristic (even his insurance coverage), the Court of Appeals would not have tolerated the mild response of the District Court. *E.g.*, *Cuccarese* v. *Soloman*, 405 F.2d 866, 867 (2d Cir. 1969). By the same token it should not be tolerated when the victim is a corporation. To draw such a distinction between individual and corporate defendants would violate the constitutional values embodied in the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *Cf.*, *e.g.*, *Louis K. Liggett Co.* v. *Lee*, 288 U.S. 517, 536 (1933). At a time of greatly heightened public awareness of consumer and environmental issues, it is particularly important to make clear that this Court will not tolerate such calculated and unfair attempts to arouse prejudice against corporations.

5. Other Points

a. The Majority of the Court of Appeals Required Unnecessarily Detailed Offers of Proof

At the trial defendant attempted to show (1) the number of Mustangs made and sold without any similar complaints (R. 88a, 350a), (2) the merits of its gas tank design (R. 592a-593a), and (3) the high frequency of similar accidents at the same location (R. 532a, 535a). All of this evidence was excluded by the District Court, and the majority of the Court of Appeals affirmed, not on the ground that the evidence was inadmissible, but on the ground that detailed offers of proof were not made (8a-13a). Other

Courts of Appeals have held that an offer of proof is necessary only if the thrust of the excluded question is not plain. *See, e.g., Maguire* v. *Federal Crop Ins. Corp.*, 181 F.2d 320, 321-22 (5th Cir. 1950). The majority's insistence on detailed offers of proof in this case conflicts with these holdings.

b. A Verdict Should Have Been Directed on the Basis of Defendant's Uncontroverted Tests

Defendant's physical tests showed that plaintiff's theory of the accident could not be reproduced with an actual Mustang. Specifically, they showed that even if a pinhole had been present in the gas tank the fumes could not have reached an explosive level under the conditions claimed and that there would have been a pronounced odor of gasoline (R. 614a-618a, 622a-623a). It is undisputed that there was no such noticeable odor (R. 157a). The Court of Appeals held that although these tests were not contradicted or countered by any tests performed by plaintiff, they did not require a directed verdict because of unproven, hypothetical physical variables and because they were performed by employees of the defendant rather than a so-called independent expert (4a-7a).* Despite these attempted dis-

* The majority opinion also suggested that these test results should not even have been admitted in evidence unless made in the presence of both parties or by an independent expert, citing McCormick, Evidence § 169, at 362 (1954) (7a). In fact, as Professor McCormick admitted, this is not a statement of the law as it is but as Professor McCormick felt it should be. *See also, e.g.*, 2 Wigmore, Evidence § 445 (3d ed. 1940), 5 *id.* § 1385(3). The newly published second edition of Professor McCormick's treatise, prepared by Professor Cleary, the Reporter for the proposed federal rules of evidence, tacitly admits that the law has not moved in the direction Professor McCormick posited. McCormick, Evidence § 202, at 487-88 (2d ed. Cleary 1972).

tinctions, the holding of the Court of Appeals is in conflict with decisions of other Courts of Appeals which have accepted the results of physical tests as conclusive. *See, e.g., Zollman* v. *Symington Wayne Corp.*, 438 F.2d 28 (7th Cir.), *cert. denied*, 404 U.S. 827 (1971).

Moreover, the rejection of defendant's tests by the Court of Appeals is clearly at variance with the decisions of the New York courts, which have accepted defendants' testimony regarding physical facts as conclusive.* Therefore, if the Court of Appeals correctly stated the federal rule, this case presents the issue whether the federal or state standard of sufficiency of the evidence controls in a diversity case, which this Court has not yet decided and on which there is a conflict among Courts of Appeals. *See Mercer* v. *Theriot*, 377 U.S. 152, 156 (1964) (per curiam); *Dick* v. *New York Life Ins. Co.*, 359 U.S. 437, 444-45 (1959); 9 Wright & Miller, Federal Practice and Procedure § 2525 (1971).

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* *See, e.g., Hudson* v. *Rome, W. & O.R.R.*, 145 N.Y. 408, 40 N.E. 8 (1895); *Peretore* v. *Pennsylvania R.R.*, 284 A.D. 472, 131 N.Y.S.2d 696 (1st Dep't 1954).

CONCLUSION

For the reasons given above, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on July 10, 1972.

Dated: New York, New York
September 20, 1972

Respectfully submitted,

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APPENDIX A

Opinions in the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 672—September Term, 1971.

(Argued May 3, 1972 Decided July 10, 1972.)

Docket No. 72-1051

MAURIZIO D. FORTUNATO,

Plaintiff-Appellee,

v.

FORD MOTOR COMPANY,

Defendant-Appellant.

Before:

KAUFMAN, ANDERSON and MANSFIELD,

Circuit Judges.

Appeal by defendant, Ford, from the denial of its motions for a directed verdict, a judgment notwithstanding the verdict, and a new trial after a jury verdict for plaintiff in a diversity case for breach of warranty and negligence in the United States District Court for the Eastern District of New York, Edward R. Neaher, Judge.

Affirmed.

LAWRENCE E. WALSH, ESQ., New York, N. Y. (Davis, Polk & Wardwell, Daniel J. Coughlin, Esq., and Guy M. Struve, Esq., New York, N. Y., on the brief), *for Appellant.*

BENJAMIN H. SIFF, ESQ., New York, N. Y. (Edelman, Berger & Peters, Brooklyn, N. Y. and Thomas R. Newman, Esq., New York, N. Y., on the brief), *for Appellee.*

ANDERSON, *Circuit Judge:*

On July 7, 1967, Maurizio Fortunato drove his six weeks old 1967 Ford Mustang from his home in Weehawken, New Jersey, to a dance hall in Manhattan. After arriving there about 10:00 or 10:30 p.m., he met a girl with whom he danced and drank two or three highballs. He left about an hour later and took the girl to her home in Queens. From there he headed for Manhattan by way of the Queensboro Bridge. Just as he was approaching an "S" curve on the ramp leading from the upper level of the bridge, the inside of his car erupted into flames as he was lighting a cigarette with the car's lighter. The car then went out of control, struck the right side of the bridge, and caromed to a stop astride the divider in the left lane. He was pulled from the burning car by a tow truck operator, Joseph Comparato, who had been traveling behind Fortunato on the bridge. The plaintiff had suffered second and third degree burns over 45% of his body. An ambulance was called and he was rushed to a hospital.

At the trial, the principal issue was whether or not any defect in the design or manufacture of the Ford Mustang was the cause of Fortunato's injuries. The plaintiff's theory was that the Mustang gas tank design was unsafe because the tank formed an integral part of the body of the car, i.e. the top of the tank served also as the floor of the trunk,

instead of being separately strapped onto the outside of the car with a space between the top of the tank and the floor of the trunk as it is in most other makes of automobiles. In addition, the plaintiff offered proof that an imperfection in the metal used for the top of the tank gave rise to a small hole which allowed gasoline vapors to escape into the trunk of the car and eventually to diffuse into the passenger compartment, where they were ignited by the cigarette lighter. Fortunato's claims were corroborated by Comparato who testified that he saw the car burst into flame from the inside before it hit the bridge wall and also by several expert witnesses who testified that the combination of factors described above was the probable cause of the accident.

Ford, in turn, argued that any hole in the gas tank was caused by rust after the accident and not by any fault in the metal. But as its most important point, Ford maintained that Fortunato's explanation of the accident was physically impossible and that the accident happened because Fortunato, who had been drinking and was unfamiliar with the bridge, failed to negotiate the curve and caused the car to catch fire by rupturing the gas tank against the bridge wall.

In support of its view that the plaintiff's claim was untenable, Ford introduced the testimony of one of its employees, Paul Toth, who had run some tests on another 1967 Mustang in Dearborn, Michigan, during September of 1971. Toth testified that he punched a hole in the gas tank just slightly larger than the one in Fortunato's tank and then drove the car various distances under differing conditions, including some with the windows open and some with them shut. At no time was he able to create

a heavy enough gasoline vapor mixture to be explosive; he said, however, that whenever there were fumes in the passenger area, they gave off a strong odor. Toth did testify that after leaving the car standing in the sun with the windows closed for ten minutes, the vapor mixture in the car was 86% of the explosion point, and he estimated that it would have been reached in another five minutes.

Ford claims that it was entitled to a directed verdict or a judgment notwithstanding the verdict on the basis of Toth's tests which proved that Fortunato's car could not have caught on fire in the way he explained, especially in light of the fact that Fortunato never smelled any gasoline odors and he was driving at night with the driver's window half open.

I

On this appeal, we need not determine whether or not the federal or the state sufficiency of the evidence standard is to be applied because the results would be the same under either test, *cf. O'Connor* v. *Pennsylvania R. Co.*, 308 F.2d 911, 914 (2 Cir. 1962). In determining whether the motions for a directed verdict and a judgment n.o.v. were properly denied, this court must "view the evidence in the light most favorable to [Fortunato] and give [him] the benefit of all inferences which the evidence fairly supports, even though contrary inferences might reasonably be drawn," *Continental Ore Co.* v. *Union Carbide*, 370 U.S. 690, 696 (1962); see also *Simblest* v. *Maynard*, 427 F.2d 1, 4 (2 Cir. 1970). Taking that view of the evidence we must then decide whether or not "reasonable men" could return a verdict for the plaintiff, see *O'Connor*, *supra*, at 914-15; 5A J. Moore, *Federal Practice*, ¶ 50.02[1], at 2320 (2d ed. 1971).

Ford, of course, does not dispute the fact that there was more than sufficient evidence introduced by the plaintiff to support a verdict on his behalf, but it argues, rather, that much of that evidence must be disregarded because it is contrary to proven physical facts. This so-called "physical facts rule" has been widely adopted, but its application to specific cases calls for some care as it is a determination by the court that certain facts may not be found by the jury. Such a decision should not be lightly made because unexpected and quite unusual factual situations have often occurred, and the duty of the court is not to decide whether the defendant's theory is probably right, but to determine whether or not an element of the plaintiff's case, which it claims to have proved and upon which a verdict for the plaintiff would have to be based, is physically and factually impossible, see *Born* v. *Osendorf*, 329 F.2d 669, 672 (8 Cir. 1964). As Professor James has pointed out, the doctrine of excluding evidence because it is incredible as a matter of law is used sparingly, F. James, *Civil Procedure*, § 7.11, at 273-74 (1965), and the trend is toward even greater restraint in its use on the part of the courts, 2 F. Harper & F. James, *The Law of Torts*, §15.2, at 877 (1956).

When applying the doctrine the courts have been quick to indicate that the physical fact relied upon must not itself be in doubt by saying that it must be "uncontested", *O'Connor*, *supra*, at 915; "incontrovertible", *Dostal* v. *Baltimore & O. R. Co.*, 189 F.2d 352, 354 (3 Cir. 1951); "uncontradicted", *Granat* v. *Schoepski*, 272 F.2d 814, 815 (9 Cir. 1959); "undisputed", *Zollman* v. *Symington Wayne Corp.*, 438 F.2d 28, 31 (7 Cir.), *cert. denied*, 404 U.S. 827

(1971); or "clearly contrary to an immutable law of physics," *Kansas Public Service Co.* v. *Shephard*, 184 F.2d 945, 948 (10 Cir. 1950).

Proof of this standard has been supplied when the physical fact was admitted by the opposing party, *Zollman, supra; Peretore* v. *Pennsylvania R. Co.*, 131 N.Y.S.2d 696, 697 (App. Div. 1954), was an easily measured distance or height; *Hunter* v. *New York, O. & W. R. Co.*, 116 N.Y. 615 (1889); *Moore* v. *Bd. of Education*, 255 N.Y.S.2d 540 (App. Div. 1964) *aff'd* 19 N.Y.2d (1967); or was a weather report supported by neutral documentation, *O'Connor, supra.*

For a number of reasons, the tests performed by Toth do not bring the case within the physical facts rule. For example, we know nothing of the condition of the test car other than that it was a 1967 Mustang. The distances driven, the type and amount of gasoline in the tank, the comparative smoothness or roughness of the roads, the amounts of resulting sloshing of gasoline in the tanks and the relative amounts of gasoline fumes which may have been thereby forced through the holes are not shown to have been approximately the same. All the test measurements were made by using a combustible gas indicator, but it is not known whether these measurements were made at floor level or seat level where the fumes would be more dense or halfway from floor to ceiling or at ceiling level where they would be less dense, nor was a test made with a cigarette lighter at different levels in a closed chamber, comparable to that of a car in atmospheric conditions of pressure and temperature like those at the time of the accident.

In addition, all of the tests were run by an employee of the defendant who was asked to make them in connection with this case. They were not subject to any independent verification. Furthermore, no written report on the outcome of the tests was made by Toth prior to the trial. Test results should not even be admissible as evidence, unless made by a qualified, independent expert or unless the opposing party has the opportunity to participate in the test, C. McCormick, *Evidence*, § 169, at 362 (1954). Certainly the jury should be permitted to pass on the credibility of the witness and the accuracy with which he conducted his experiments, cf. *Jarmen* v. *Philadelphia-Detroit Lines*, 131 F.2d 728, 730 (4 Cir. 1942). Though the purpose of the tests was to demonstrate the impossibility of plaintiff's theory, they did show that under certain circumstances, very high quantities of gasoline vapor did enter the passenger compartment of the car.

The plaintiff's allegation was supported, not only by his own testimony that the fire came from inside the car but by that of the neutral eyewitness Comparato; and in contradiction to Toth's experiments was expert testimony that such an occurrence was a distinct possibility. Considering the mass of reputable conflicting evidence, this case was properly submitted to the jury and was clearly not a case in which to apply the physical facts rule, cf. *Russel* v. *Gonyer*, 264 F.2d 761 (1 Cir. 1959); *Dostal, supra*, at 355.

Therefore, even if the tests and their results are assumed to be strong evidence in favor of Ford's position, they fell far short of the uncontroverted proof required to justify a court in taking the issue from the jury. The denial of the motions for a directed verdict and a judgment n.o.v. are affirmed.

II

Ford argues that a new trial is required because four items of evidence were excluded. In no instance, however, did Ford make an offer of proof, as provided for by Fed. R. Civ. Proc. 43(c), and it is therefore necessary to make some general comments on this failure before looking at the specific allegations of error.

While Rule 43 does not mandate an offer of proof, and this court has not held that such an offer is an absolute prerequisite in every appeal from the exclusion of evidence, *see, e.g., Massachusetts Mut. Life Ins. Co.* v. *Brei*, 311 F.2d 463, 465 n. 1 (2 Cir. 1962); *Meaney* v. *United States*, 112 F.2d 538, 539 (2 Cir. 1940), it is required where the significance of the excluded evidence is not obvious or where it is not clear what the testimony of the witness would have been or that he was even qualified to give any testimony at all, *Herencia* v. *Guzman*, 219 U.S. 44, 46 (1910); *Marrone* v. *United States*, 355 F.2d 238, 241 (2 Cir. 1966); *Moss* v. *Hornig*, 314 F.2d 89, 93 (2 Cir. 1963); 5 J. Moore, *Federal Practice*, ¶43.11, at 1381-82 (2d ed. 1971).

The main purposes for this rule are to permit the trial judge to reevaluate his decision in light of the actual evidence to be offered, *cf.*, McCormick, *Evidence*, § 51, at 113-14 (1954), and to permit the reviewing court to determine if the exclusion affected the substantial rights of the party offering it, Fed. R. Civ. Proc. 61. An appellate court will not reverse on the mere possibility that the exclusion was harmful, *Palmer* v. *Hoffman*, 318 U.S. 109, 116 (1943); *Boulter* v. *Chesapeake & O. R. Co.*, 442 F.2d 335, 336 (6 Cir. 1971); *Sorrels* v. *Alexander*, 142 F.2d 769, 770 (D.C. Cir. 1944), nor will it permit a party to allege on appeal

what it failed to claim to the trial court. To do so would allow a party to obtain a new trial simply on its claim that it would have proven a certain fact or facts had it been given a chance.

More specifically, Ford first asserts that it was improperly barred from showing that out of a large number of cars sold no owner had complained of a defect similar to that claimed by Fortunato. Even assuming that such evidence would be admissible,[1] it is clear that there was no error in the exclusion of it here. Ford's only attempt to show the absence of complaints was through the cross-examination of two of Fortunato's expert witnesses, Edward Gloyd and Daniel O'Connell. Gloyd, who was employed in the Safety Office of the Chief of Engineers of the United States Army, was asked, "Do you know how many of the Ford line the Army buys a year?" Objection to the question was sustained. Counsel for Ford did not explain to the trial court what the purpose of the question was or what line of inquiry he was seeking to pursue, nor did he ever make an offer of proof. O'Connell, a licensed consulting engineer in New York, was asked if he had any idea of the number of Mustangs made and sold in the years 1964 to 1967. Again objection was sustained; no

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[1] It is highly questionable whether evidence showing the absence of any similar complaints would be admissible in this case, which was primarily one of a breach of warranty, because the plaintiff withdrew any reliance on a negligence theory during trial. A breach of warranty gives rise to strict liability which is not necessarily negated by a showing of due care or a lack of knowledge of the defect on the part of the manufacturer or seller, *Blessington* v. *McCrory Stores Corp.*, 305 N.Y. 140, 111 N.E.2d 421 (1953); W. Prosser, *The Law of Torts*, § 95 at 652 (3d ed. 1964). Therefore, evidence of a lack of prior complaints is rarely probative on the warranty issue, *see Frank R. Jelleff Inc.* v. *Braden*, 233 F.2d 671, 677-80 (D.C. Cir. 1956).

explanation of the purpose was given, and no proper foundation was laid.

It is difficult for us to see what relevance these questions, asked of witnesses not connected with the Ford Motor Company, could have had in demonstrating a lack of prior complaints to Ford concerning the gas tank design of a 1967 Mustang. The court was not in error in excluding answers to these questions, *Herencia, supra; Marrone, supra.*

Ford next complains that it was not permitted to show the advantages of its gas tank design in order to counter Fortunato's claim that it was unsafe; however, Ford never made any attempt to do so. What it did try to do was to ascertain through one of its design engineers, Gilford Gorker, whether the thickness of the metal in the Mustang tank was greater than that used in the more customary, strapped-on tanks. Even if we assume that Gorker would have testified that the Mustang tank was thicker, this evidence would not be relevant to this case in which the issue was whether or not there was a hole in the tank which allowed fumes to go into the passenger compartment of the car. If there were such a hole, it would not matter how thick the tank was, and the claimed design defect was that there was no space between the top of the gas tank and the floor of the trunk.

Ford's third contention is that it was unable to show the dangerous nature of the "S" curve on the bridge, which would have supported its theory of the accident. Competent evidence of accidents similar to Fortunato's on that segment of the bridge would have been admissible, *see, e.g. Dist. of Columbia* v. *Armes*, 107 U.S. 519, 524-25 (1883);

Kaplan v. *City of New York*, 200 N.Y.S.2d 261 (App. Div. 1960); McCormick, *Evidence*, §167, at 350-51 (1954); however, the exclusion complained of was not error.

Ford had called Thomas McNulty, the patrolman who investigated the Fortunato accident, as a witness and had elicited from him, without objection, the fact that he had been called to two or three other accidents on the bridge prior to the one in question here. The defendant then asked McNulty if there was a high accident rate chart in the station house, but an objection was sustained to the question.

The question was clearly improper because any information contained on the chart would be hearsay as testimony of McNulty. Although the records forming the basis of any such chart, and perhaps the chart itself, would be admissible under the Federal Business Records Act, 28 U.S.C. §1732(a), there was no attempt to enter the records nor was any effort made to lay a proper foundation for offering them, *cf.*, *United States* v. *Dawson*, 400 F.2d 194, 198-99 (2 Cir. 1968), *cert. denied*, 393 U.S. 1023 (1969). Therefore, this court has no means of knowing whether or not the "S" curve was a high accident area and whether or not any other accidents followed a pattern similar to that in the present case.

Finally, Ford claims error in the exclusion of testimony designed to impeach Comparato by showing a prior inconsistent statement. Comparato had testified that he saw Fortunato's car erupt with flames from the inside before it struck the bridge, but Ford claims that Comparato had previously told one of its investigators, John Hughes, that he first saw flames outside the Mustang before it hit the

bridge and then flames also appeared inside after the car had hit the retaining wall and the divider. Hughes died, however, prior to trial, and Ford attempted to get in the impeaching testimony through Donald Conway, who testified that he was present when Hughes made a telephone call to Comparato.[2] The transcript does not reveal whether Conway was on an extension line[3] or if he just heard

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[2] The direct examination of Conway included the following:

"Q. Do you have any knowledge as to what Mr. Capirado [sic] said to Mr. Hughes?

Mr. Peters: Objection to this.

The Court: Mr. Conway, it's so clearly hearsay unless you are going to have some reason why Mr. Conway could speak about this of his own knowledge, I don't see how I could possibly—

Q. Mr. Hughes is now dead? A. Yes.

Q. When did he die? A. August 14, 1971.

Q. Did you and Mr. Hughes share an office? A. We did.

Q. Were you present when a telephone conversation was had between Mr. Hughes and Mr. Capirado? [sic]

Mr. Peters: I object to that when a conversation was had between somebody else and somebody else.

The Court: He can say he was present.

Mr. Peters: How does he know who was on the other end of the phone?

The Court: Would you have a basis of knowing?

The Witness: He told me he was calling him.

The Court: Again I believe that is hearsay.

Mr. Conway: All right, sir.

You never spoke to Mr. Capirado [sic] yourself?

The Witness: No, I did not.

Mr. Conway: I have no further questions.

Mr. Peters: I have no questions, your Honor."

[3] We need not decide the difficult question of whether or not circumstantial evidence would have been sufficient to identify Comparato to Conway as the person on the other end of the line, assuming that Conway did hear that voice, cf. *United States* v. *Fassoulis*, 445 F.2d 13, 17 (2 Cir.), cert. denied, 404 U.S. 858 (1971); *United States* v. *Benjamin*, 328 F.2d 854, 861 n. 3 (2 Cir.), cert. denied, 377 U.S. 953 (1964), because there was no proper foundation laid for the impeachment.

Hughes' end of the conversation, but it does reflect the fact that Conway only knew that Hughes was talking with Comparato because Hughes told Conway that he was telephoning him.

During Ford's cross-examination of Comparato, the latter acknowledged that he had spoken to a man on the telephone who might have been Hughes; however, Comparato claimed that he told the person on the telephone that he would not answer any questions concerning the accident.[4] Although it is the rule that a prior inconsistent statement cannot be used to discredit a witness unless he has first been asked whether or not he made such a statement, *United States* v. *Hayutin*, 398 F.2d 944, 953 (2 Cir.), *cert. denied* 393 U.S. 961 (1968), Comparato was never asked.

The court cannot accept Ford's self-serving statement in its brief on appeal of what the alleged inconsistent statement was. The purpose of the line of inquiry and an offer of proof must be made at the trial where the witness is available and the trial court is in a position to reconsider its decision.

III.

Ford also contends that the plaintiff's summation, in a number of respects, was so unfair as to require a new trial; however, an examination of the closing arguments

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[4] The cross-examination of Comparato, with reference to the alleged inconsistent statement, included only the following:

"Q. Didn't he [Hughes] have a long telephone conversation with you reviewing what you had said before? A. No, I told him I wouldn't answer any questions, only to tell one story."

of counsel in the light of the transcript and other parts of the record makes clear that this claim is without merit.

Error is claimed in relation to counsel's argument concerning the cutout piece of metal containing the small hole which, Fortunato alleged, permitted gasoline vapors to escape from the gas tank. There was testimony at the trial that the plaintiff's expert metallurgist, Dr. Morfopoulos, had cut this piece from the tank in order to make photographs and give it close scrutiny under a microscope. Dr. Morfopoulos also testified that he had returned the piece of metal to plaintiff's counsel and had heard that it had been lost. The rest of the gas tank was put into evidence, but the piece with the actual hole in it was never produced. There were in evidence, however, numerous pictures of the hole from several angles and at various magnifications.

During argument plaintiff's counsel told the jury that he did not know where the missing piece was and asked the jury to "throw us out of court" if it felt he was at fault for losing the piece of metal.[5] These remarks were im-

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[5] Summation by Mr. Peters for the plaintiff included the following:

". . . Take a look at the size of the piece that is missing. It is half the size of an old three-cent stamp, and that piece was sectioned in several pieces so it could be cross-photographed in a microscope.

Do you know what we are dealing with in our office? Specks. I can't tell you where it is, if I could I wish to God I would. I don't know where it is. I never even—

Mr. Conway: Your Honor, I am going to object to Mr. Peters trying to get some testimony in at this point.

The Court: I think enough has been said on that, Mr. Peters.

Mr. Peters: The court is going to charge you that if we intentionally lost that piece so as to prevent you or them from

proper as an effort by counsel to testify, in effect, that he did not know where the metal was; but the court immediately instructed the jury to disregard the statements of counsel that were not supported by facts in evidence and under the circumstances we conclude that the error was not so substantial as to warrant an order for a new trial. In his charge, the judge correctly instructed the jury that it might draw a strong inference against the plaintiff, if it determined that the failure to produce the piece of metal was intentional,[6] *cf.*, ***Matarese*** **v.** ***Moore-McCormick Lines,***

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seeing it, you may draw the greatest of inference from that, and I tell you right now I want you to go further than the court charges you against me if you feel that I or anybody from my office intentionally lost that piece—

Mr. Conway: This is objected to, there is no such testimony, and now Mr. Peters—

Mr. Peters: May I continue?

Mr. Conway: Is he going to do some testifying?

The Court: Please, Mr. Peters, let's get beyond that.

Mr. Peters: I say throw us out of court, if it is my fault or anybody's fault, regardless, throw us—

Mr. Conway: I object to this. There is no proof on this one way or the other except Mr. Peters' unsupported, unsworn statement that he is now trying to make and I object and I insist, Your Honor, it is improper.

The Court: The jury will be told again to disregard statements of counsel with respect to whether or not the facts they ask you to draw are facts."

[6] The court charged:

"There is one further matter for your determination with respect to the evidence. A small piece of the gasoline tank in evidence was not produced by the plaintiff whose attorneys last had it in their control.

This piece, it has been testified, contains the tiny hole, the existence, nature, cause and duration of which is one of the sharply disputed and important issues in this case. It is for you to determine whether or not under all the surrounding circumstances and evidence the failure to produce this piece of physical evidence was intentional. If you so find you may draw a strong inference that its production in the trial would have been unfavorable to the plaintiff's interest."

158 F.2d 631, 637 (2 Cir. 1946); *Austerberry* v. *United States*, 169 F.2d 583, 593 (6 Cir. 1948); 2 J. Wigmore, *Evidence*, § 291, at 180-188 (3d ed. 1940).

Furthermore, Ford has never claimed any actual prejudice from its failure to have physical access to the metal. Upon discovering that the metal was missing, a consent order was entered permitting Ford to take the deposition of Dr. Morfopoulos, and its own expert metallurgist, Dr. Eisenberg, testifying from the photographs, stated categorically, at least seven times, that the hole was caused by rust after the accident and not by an imperfection in the manufacturing process. Not once did Dr. Eisenberg indicate that his opinion was hindered by his inability to see the actual hole, even though defense counsel made repeated reference to the fact that the metal was missing.

Ford claims as other grounds for a new trial that counsel for the plaintiff made a number of prejudicial and unfair arguments to the jury in his closing summation. It asserts that he played upon the sympathies of the jurors and that he called upon the jury to punish Ford by its verdict. The court specifically charged the jury that it could not award punitive damages and, considering the severity and extent of the injuries, this court cannot say that the verdict, though high, was excessive or resulted from sympathy or an intent to punish Ford.[1] The appellant's remaining points are minor and not of sufficient merit to call for discussion.

The judgment of the district court is affirmed.

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[1] Ford does not claim that the $400,000 verdict was excessive. Fortunato had special medical damages of $50,000, lost earnings of $15,000, and a potential future loss of wages exceeding $150,000, in addition to suffering intense pain for many months after the accident and permanent physical and psychological injuries.

MANSFIELD, *Circuit Judge* (Concurring and Dissenting):

I concur in the view that a directed verdict for the defendant was not mandated by the "physical facts rule", substantially for the reasons stated by the majority. On the other hand, the tests and expert testimony introduced by Ford in its effort to show that the accident could not have been caused by a defect in the gas tank of plaintiff's Mustang, when considered with all of the other evidence, demonstrates that the issue of liability was an extremely close one. With the scales so evenly balanced Ford, in my view, was erroneously precluded from introducing proof which might well have persuaded the jury to conclude that the plaintiff had failed to sustain his burden. This error was compounded by grossly improper and prejudicial comments by plaintiff's counsel in his summation, some of which were approved by the trial court. The effect was to deny Ford substantial rights. I would therefore remand the case for retrial.

Plaintiff's claim is that enough gasoline vapor to cause an explosion escaped through a pinhole in the top of the "drop-in" gas tank of his Mustang, seeped through or around the mat on the floor of the trunk, collected on the floor of the passenger compartment, despite the fact that one of the windows was open, and erupted into flames when he attempted to use the automobile's cigarette lighter. He admitted having drunk two or three Scotches and sodas within approximately an hour of the mishap and the records of the hospital to which he was admitted immediately after the accident recorded him as "conscious and drunk". Despite his testimony that he threw his hands to his face when the interior of his car burst into flames and that he recalled nothing more until he woke up in the hospital, he

successfully negotiated the first leg of a dangerous S-curve, then hit the second half, rebounded, and came to rest on the left divider of the 59th Street Bridge.

Plaintiff's version of the accident was substantially corroborated by the testimony at trial of the tow truck operator, Comparato, who testified that he was driving behind him. However, Comparato had told the investigating police officer immediately after the accident that he had not witnessed it. Furthermore, although Comparato, who pulled plaintiff from the car and towed it away, testified that the car had burned only on the inside, without any flames developing on the outside of the car, photographs taken later reveal extensive burning on the outside of the automobile, ruptures on the bottom of the gasoline tank and a longitudinal crack along the left side of the tank.

After the accident the floor of the trunk of plaintiff's car, which was also the top of the gas tank, was exposed for many months to the elements, with rust and erosion developing from accumulations of water and from chemicals that had been used to extinguish the fire. One of plaintiff's experts testified that six months after the accident he discovered a pinhole in the center of a rusted depression in the top of the tank, in which moisture collected. This condition was examined by another of plaintiff's experts some 13 months after the accident. The tank and the purported hole were photographed. A small section containing the hole was then cut out of the tank. Plaintiff's theory as to liability depended entirely upon the hole found in this piece of metal. His experts testified that it was caused by a defect upon manufacture, which permitted gasoline vapor to escape into the car and to explode. Despite the crucial importance of this small piece of metal it mysteriously disappeared before trial and could not be examined by defendant's ex-

pert or by the jury to determine whether the hole had actually existed at the time of the accident or had been caused by something other than a defect, such as corrosion or a sharp blow.

Shortly before trial tests were conducted by defendant's expert, Paul E. Toth, using a 1967 Mustang with a larger hole in the top of the tank, to determine whether gasoline vapor would enter the passenger compartment in sufficient quantities to explode. Toth testified that, assuming the existence of the hole at the time of the accident, even under test conditions designed to maximize the amount of vapor that would enter the passenger compartment, the vapor did not build up to a point where it would explode. He further testified that plaintiff would have smelled a strong and definite odor of gasoline before the build up of any such vapor. Plaintiff had testified that he had not smelled any gasoline odor before the accident.

It is against the foregoing background that we must consider some of the trial court's rulings with respect to evidence offered by Ford. Throughout the trial it was plaintiff's contention that Ford's use of a "drop-in" gasoline tank in lieu of a "strap-on" model was dangerous. For example, plaintiff's expert O'Connell, without having made any tests, testified:

> "The design, the arrangement of the gasoline tank relative to the passenger compartment, it is extremely dangerous because it allows direct connection with a highly dangerous flammable fluid and this compartment and when we take into account the trough-like design of the floor of the passenger compartment to act as a trap, and to allow this flammable fluid to accumulate, then the entire arrangement is extremely dangerous. There is no question about it."

In an effort to counter plaintiff's contention that the tank design was unsafe, Ford's counsel at an early stage of the trial attempted to elicit testimony to the effect that a large number of Mustangs had been sold, obviously to support Ford's contention that the sale of several million automobiles of the same design prior to the accident would tend to disprove plaintiff's theory, since there would probably have been earlier complaints if the design of the Mustang type gasoline tank was dangerous or defective. The relevancy and admissibility of such evidence has long been recognized. See, e.g., *Fletcher* v. *Baltimore & P.R.R.*, 168 U.S. 135, 141 (1897); *De Salvo* v. *Stanley-Mark-Strand Corp.*, 281 N.Y. 333, 339-40 (1939); *Bachmann* v. *Little*, 152 App. Div. 811, 812-13, 137 N.Y.S. 699, 701 (1st Dept. 1912).[1] For in-

[1] Footnote 1 of the majority opinion states that this was "primarily" a breach of warranty case. The complaint contained a negligence cause of action as well as one for breach of warranty. The negligence claim alleged:

> "That the aforesaid occurrence and injuries were caused by the negligence and carelessness of the defendants, their agents, servants and/or employees, which negligence and carelessness consisted of the following amongst other things; in negligently, carelessly and improperly manufacturing, designing, assembling, adjusting and maintaining the aforesaid motor vehicle; in permitting, allowing, causing and/or suffering the aforesaid motor vehicle to be and remain in an unsafe, improper and dangerous condition; in failing to remedy the aforesaid dangerous and unsafe condition; in failing to make proper and adequate inspections, adjustments and repairs to the aforesaid motor vehicle; in causing and permitting the said motor vehicle to be sold to plaintiff containing a defective part or parts therein and/or part or parts which were dangerously and carelessly placed therein, and/or part or parts which were improperly manufactured, designed, assembled and adjusted to be placed therein, which were inherently dangerous with knowledge and notice that said motor vehicle would be used and driven by the plaintiff and in thereby exposing the plaintiff to a position of danger and peril in wanton disregard of plaintiff's safety; . . . in causing and permitting the negligent construction, design and assembly of said motor vehicle, particu-

stance, after plaintiff offered the testimony of Edward R. Gloyd, Assistant Chief of the Safety Office of the U.S. Army Corps of Engineers, regarding his investigation of a similar gas tank design, Ford's counsel unsuccessfully sought to elicit the number of Ford cars purchased by the Army. Upon objection by plaintiff Ford's counsel pointed out "If it's an awful bad design, I doubt whether they would buy more than one," to which plaintiff's counsel replied, "They may be so darn cheap that they would buy them." Sustaining the objection, the court reprimanded Ford's counsel. In my view the ruling was erroneous and the reprimand was unjustified, since the question was relevant. See *De Salvo, supra; Bachmann, supra.*

Upon cross-examination of O'Connell (one of plaintiff's experts), Ford's counsel attempted to bring out the large number of Mustangs that had been sold in the years 1964-67, pointing out "Your Honor, when they are claiming that there was a bad defect, I should be able to give the vast number of Mustangs sold and made," and again the court sustained an objection. At the close of the trial plaintiff's

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larly the gasoline tank and trunk floor portions thereof; in causing, permitting and allowing the gasoline tank of the aforesaid motor vehicle to be located underneath the floor of the trunk and/or to be a constituent part of the gasoline tank of the said motor vehicle; in causing and permitting the gasoline tank, forming the bottom portion or floor of the trunk, to develop a small hole so that gasoline from the motor vehicle gas tank and/or fumes therefrom was caused to leak into and become trapped inside of the trunk; . . . ."

It was not until after presentation of the plaintiff's case and denial of Ford's motions to dismiss both causes of action that plaintiff's counsel indicated he was "proceeding under the theory of express and implied warranties." Even then, the negligence cause of action was never explicitly withdrawn or dismissed. Absent such positive action I believe that Ford was fully justified in attempting to show the large number of Mustangs sold and the lack of other similar complaints.

counsel, in a turn-about, indicated that he intended to comment to the jury on the defendant's failure to prove that despite the large number of "drop-in" gas tank installations there had been no complaints or only a limited number. Ford's counsel objected on the ground that he had been precluded from offering such proof. Thereupon the court stated unequivocally that it considered such evidence "highly speculative" and that therefore it would not permit the proposed comment. Certainly, once Ford had been barred from eliciting evidence as to lack of complaints, it was proper for the court not to permit plaintiff's counsel to comment on Ford's failure to do so but I do not regard the evidence itself as "highly speculative" and I believe that Ford should have been allowed to introduce it. See, e.g., *De Salvo, supra; Bachmann, supra; Moore* v. *Board of Education*, 22 App. Div. 2d 919, 255 N.Y.S.2d 540 (2d Dept. 1964), *aff'd. mem.*, 19 N.Y.2d 621 (1967).

Lastly, Ford's counsel sought to counteract testimony of plaintiff's experts that the Mustang tank design was dangerous, by seeking to bring out through Ford's own witness, Gilford Gorker, a Ford design engineer, that the steel incorporated in the top of the Mustang gasoline tank was thicker or heavier in gauge than that used in "strap-on" models. Once again an objection was sustained.

In my view it was error for the trial court, on the one hand, to permit the plaintiff to offer expert testimony to the effect that the design of the Mustang tank was dangerous and defective, and, on the other, to tie Ford's hands by precluding it from offering proof as to the large number of similar tanks made without accident or claims of defect and as to the safety features incorporated in the design of the Mustang tank, including thicker steel construction and the like.

The foregoing errors were magnified by the court's approval of repeated argument by plaintiff's counsel in summation to the effect that Ford, by adopting the dangerous Mustang tank design testified to by plaintiff's expert, had sacrificed safety in order "to save money." There was no proof in the record to the effect that the flange-mounted "drop-in" tank design used in the Mustang was less expensive than the "strap-on" design used in some other models. Indeed, for all we know it may have been more expensive, since a heavier gauge of metal apparently was used in the top of the Mustang tank, its top was corrugated and it required construction of a flange-mounting. When Ford's counsel pointed out the lack of any evidentiary basis for the statement of plaintiff's counsel, the latter stated "It is a fair inference, your Honor," to which the trial court responded "It is fair comment." I disagree. I believe that the argument, to which the court thus gave its blessing, was highly improper and that it caused substantial prejudice to Ford.

Apparently emboldened by the court's foregoing comment, plaintiff's counsel thereupon embarked on an extensive diatribe in which he accused Ford in detail of sacrificing public safety for profit, as follows:

> "Obviously if you can use one piece of metal for two uses, two purposes, you are going to save a few pennies. Maybe even a few dollars, I don't know.
>
> "So the consideration for Ford was not safety of the public, it was profit. A little more profit makes for happy stockholders.
>
> "If they insisted on using this design, they still could have done something to help the situation. They could have, No. 1, put some vents in the trunk, put

some vent holes in the trunk compartment so in case some gas gets into the trunk, gas vapors, they can escape out into the air and not go into the passenger compartment.

"If they didn't want to put vent holes in, if they didn't want to do it, they could have done one other thing, they put a fire wall in the car between the engine and the front seat, so why couldn't they have put a fire wall between the trunk and the back seat?

"How much would it cost?

"That is where the hazard is. The engine isn't going to blow up, it is the gas vapor that is explosive if ignited.

"Put a fire wall back there.

"I don't know how much it would cost, can't cost much, put something there to prevent these vapors escaping from the trunk which get into the passenger compartment, but I guess it would cost a little bit.

* * * * *

"I am telling you in closing only one thing.

"It is apparent to me that The Ford Motor Company is somewhat more interested in fact in profit rather than the public safety, and I tell you this cannot continue and I think it is about time the customer had a few rights and I would like The Ford Motor Company to be a little more careful, if this is hazardous not to consider a profit over safety.

"And I say to you if you feel that way about this design, you let The Ford Motor Company know it and let them know—

"Mr. Conway: I think this is way, far beyond the realm of any sort of comment.

"The Court: I think you have concluded, you have concluded?

"Mr. Peters: I have just a little more.

"If you feel that way about this design, you let them know it and you let them know it loud and clear.

"Thank you." (App. at 689-90, 691)

Other portions of the record, while not independently sufficient to warrant a remand, confirm that a new trial here would serve the interests of justice. Of crucial importance and relevance was the small piece of metal cut out from the Mustang tank, described by plaintiff's experts as containing a hole that in their opinion was caused by an imperfection in manufacture. Plaintiff's failure to produce this essential item before or at trial, or to offer competent evidence explaining the failure to do so, was a highly suspicious circumstance. Without some explanation the jury might infer the worst, namely, that the evidence had been suppressed or that if produced it would have revealed that the hole had not existed at the time of the accident and that it had been caused by something other than a manufacturing defect.

Apparently sensitive to this weakness in his case, plaintiff's counsel, without subjecting himself to cross-examination, improperly used his summation to testify that his office had inadvertently lost the piece of metal, stating:

"Take a look at the size of the piece that is missing. It is half the size of an old three-cent stamp, and that piece was sectioned in several pieces so it could be cross-photographed in a microscope.

"Do you know what we are dealing with in our office? Specks. I can't tell you where it is, if I could I wish to God I would. I don't know where it is. I never even—".

Appendix A—Opinions in the Court of Appeals

When Ford's counsel objected the court, instead of sustaining the objection and reprimanding plaintiff's counsel, asked him to take up another topic, whereupon plaintiff's counsel continued:

> "The court is going to charge you that if we intentionally lost that piece so as to prevent you or them from seeing it, you may draw the greatest of inference from that, and I tell you right now I want you to go further than the court charges you against me if you find that I or anybody from my office intentionally lost that piece—".

The foregoing statements of plaintiff's counsel were most improper. See Code of Professional Responsibility DR 7-106(C)(1), (3), 5-102, 4 N.Y. Judiciary Law App. (McKinney 1975) Supp.). Under the circumstances the court's statement to the jury instructing its members "to disregard statements of counsel with respect to whether or not the facts they ask you to draw are facts" could not cure the serious error or obliterate its harmful effect. See, e.g., *Krulewitch* v. *United States*, 336 U.S. 440, 453 (1949) (concurring opinion of Justice Jackson); *Kinchion* v. *Cheron*, 455 F.2d 902, 906 (2d Cir. 1972).

The improprieties committed by plaintiff's counsel did not stop at the foregoing. Much of his summation was devoted to unjustified, baseless and inflammatory arguments to the effect that Ford had fabricated evidence offered in its defense or had suppressed evidence that would have been harmful to its position in the case.

One last item deserves mention. Ford's attempt to impeach the testimony of Cimpanelli, who was a key witness not only because he was the only eye-witness other than

plaintiff but because, presumably neutral, he corroborated plaintiff's testimony that the interior of the car suddenly erupted into flames. Comparato conceded on cross-examination that he had received a phone call from a Ford investigator. Ford's counsel then laid a foundation for impeachment by eliciting from him denials that he had told the investigator that there was another worker with him in the tow truck when he witnessed the accident and that they saw smoke and flames coming out of the rear or bottom of the plaintiff's Mustang *before* there was any fire in the interior. Since the investigator had died before trial, Ford's counsel offered testimony of the investigator's assistant to the effect that he overheard part of the telephone conversation. Although Ford's counsel now contends that through this witness he would have offered the entire conversation between the investigator and Comparato, including statements by Comparato on material matters that were directly contrary to his trial testimony, no offer of proof was made and it does not appear that the trial judge could reasonably have anticipated the content of the impending evidence. We cannot now consider proof that should have been brought to the attention of the trial court. However, since the case in my view should be remanded on other grounds a new trial would enable the parties to resolve the issue.

Rule 61 of the Federal Rules of Civil Procedure instructs us to "disregard any error or defect in the proceeding which does not affect the substantial rights of the parties." Whether errors had such an influence on the jury in a particular case is admittedly a fine question of judgment in which precedents give little guidance for what may be

harmless in a case where the evidence strongly favors one party may be fatally prejudicial in a close case. In this case the issue of liability and causation was exceedingly close; therefore almost any error, especially the conscious impropriety of counsel with respect to material issues, mandates a new trial, for

> "The only way that the defendant can be protected against the strong possibility of harm from the improper occurrence at trial for which it was in no way responsible is by having a new trial."

Beck. v. *Wings Field, Inc.*, 122 F.2d 114, 117 (3d Cir. 1941); see *Throckmorton* v. *Holt*, 180 U.S. 552, 567 (1901); *Koufakis* v. *Carvel*, 425 F.2d 892, 904-05 (2d Cir. 1970); *Rebmann* v. *Canning*, 390 F.2d 71 (3d Cir. 1968). In the circumstances of this case I regard the cumulative effect of the errors at trial to require that a new trial be had and therefore I respectfully dissent.

APPENDIX B

Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the tenth day of July one thousand nine hundred and seventy-two.

Present:

HON. IRVING R. KAUFMAN
HON. ROBERT P. ANDERSON
HON. WALTER R. MANSFIELD
Circuit Judges.

MAURIZIO D. FORTUNATO,
Plaintiff-Appellee,

v.

FORD MOTOR COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellant.

/s/ A. DANIEL FUSARO
Clerk

APPENDIX C

Order of the Court of Appeals Denying Rehearing

72-1051

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

MAURIZIO D. FORTUNATO,

Plaintiff-Appellee,

v.

FORD MOTOR COMPANY,

Defendant-Appellant.

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

/s/ IRVING R. KAUFMAN
/s/ ROBERT P. ANDERSON
/s/ WALTER R. MANSFIELD

Circuit Judges

August 17, 1972

APPENDIX D

Order of the Court of Appeals Denying Rehearing In Banc

72-1051

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

MAURIZIO D. FORTUNATO,

Plaintiff-Appellee,

v.

FORD MOTOR COMPANY,

Defendant-Appellant.

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant, and no active circuit judge having requested that a vote be taken on said suggestion.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

/s/ WALTER R. MANSFIELD
Acting Chief Judge

August 17, 1972

APPENDIX E

Summation of Plaintiff's Counsel

(At 11:40 o'clock A.M. there was a ten-minute recess.)

The Court: Are you ready, Mr. Peters?

Mr. Peters: Yes, Your Honor.

(The jury then took its place in the jury box.)

Mr. Peters: Mr. Foreman, ladies and gentlemen: (1064) Mr. Conway:

May I at the outset simply say this:

I am going to talk—please don't groan—a wee bit longer than Mr. Conway.

I promise that I will not repeat myself unduly or at all, if I can help it, but I have so much to talk to you about. And I think you will find that what I have to say may be of some interest to you in deciding the case.

I certainly hope so.

May I say this in advance:

If I say anything to you which does not make sense, if you think it is silly or ridiculous, of course you will reject it. But on the other hand, if I give you a thought or give you an idea or maybe even reinforce an idea you got yourself during the course of the trial, if what I say makes sense to you, if it is logical, please use it in your deliberations wherever it leads you.

I think that is all an attorney can ask in summation.

We must recognize that at this point we are given an opportunity to talk to you and sort (1065) of marshall

the evidence, try to bring it all together as we see it, and at least hopefully you will see along the same lines.

At the very outset of this case both of us had an opportunity to stand before you at the moment of truth and tell you what it was we wanted to prove. I won't go over everything I told you, but I did tell you that I will prove, for instance, that our cause of action was based essentially on the fact that this was a bad design, it was a dangerous and hazardous design and for that reason the automobile was not fit for the purpose for which it was sold, and it was compounded by a problem of a defect in the floor of the trunk, namely a pinhole opening which might have gone unnoticed, unheralded and certainly would not have caused this accident except for the design.

I said and I promised to show you that we were suing the Ford Motor Company not simply because an accident took place, that is not the basis for the suit. We have attempted to show you that the Ford Motor Company has put on the market an automobile with a particular type of gas tank and (1066) trunk assembly, a choice they made, not anybody else, none of the other manufacturers used it, and Ford decided to make the floor of the trunk act as the top of the gas tank.

I daresay that there is not a thing in an automobile that is more dangerous a product than any other thing in the car, and that is the fuel and the fuel tank. Of all of the things of which a car in normal use is composed, there is only one thing that is explosive, and that is gasoline.

Appendix E—Summation of Plaintiff's Counsel

Cars use gasoline, so I think you will agree with me that it behooves the manufacturer at the very least to do what he can to protect the public from that gasoline. Not to do something which is just the opposite, increase the risk from that gasoline.

Other manufacturers have met that obligation in a better way. Ford has chosen to ignore it, and we will discuss it at some length as to perhaps why they have.

Now the court is going to give you the law in the case after we are all finished talking and I don't think it will come as a surprise, and I (1067) think he will permit me to say this to you, that this is not a negligence case:

We are not required to prove, and the judge will tell you that, that The Ford Motor Company was negligent. That is not the theory of the case, we don't have to prove it.

To win this case what we have to show, and the court will enlarge upon it, and please follow the court's direction on that, we have to show that Ford breached a duty in warranty. The judge will explain what that means.

All I can tell you is that if there were hidden defects in this car of which the customer could have no knowledge, and those defects were dangerous, concealed a danger and those defects caused the accident and the injury and that those defects came from the manufacturing of the car, and it is their design, that was their defect, well, that is what we have to establish to your satisfaction. We don't have to show they were negligent, they may well have been and you may even find that they have been,

but we don't have to go that far to win this case, and the judge will tell you that.

(1068) Let me review what Mr. Conway, on behalf of The Ford Motor Company, said to you in his opening, if you can remember back two weeks:

He was very brief, but do you know what he said, because I noted it, I wanted to know what he was going to tell you he was going to prove:

He said he was going to prove two things. No. 1, it is an excellent design, and we will discuss that for a few minutes at the proper moment, we will see whether what he said satisfied you on that score.

But the second thing he said he was going to prove to you, he said he didn't believe there was a hole there, he didn't believe it. But he said, "Even if the hole was there, it is ridiculous, ridiculous to say that a hole of the size they are claiming was big enough to cause an accumulation of gas vapors so as to cause an explosion. Ridiculous."

Mr. Tarf cut that bag of boloney into small pieces, and we will discuss that a little later.

I would like to start kind of in reverse, I would like to discuss the witnesses produced (1069) here and the evidence produced here by The Ford Motor Company in an effort to show you how Mr. Conway lived up to his promises of proof in his opening or didn't.

I would like you to bear in mind that we are dealing here with The Ford Motor Company which has at its disposal, as one witness said, and I forget the exact number, thousands of engineers in all phases of automotive engineering, thousands of them.

Appendix E—Summation of Plaintiff's Counsel

I daresay that most of them are pretty knowledgeable people in their field if maybe not all of them. And yet, who came into court leading the parade, a Mr. Eisenberg.

Who is Mr. Eisenberg?

He is a professor at the University of Rochester, but he is something more than that, he is the proprietor of a business, a consulting business, if you will, whose principal clients are General Motors, Chrysler Motor Company and The Ford Motor Company, among several others. That is what he told you.

And who else is he?

He turns out to be on cross-examination a (1070) hired gun, in a sense. Here is a man who has come to court for The Ford Motor Company every year for twenty-six years and has testified for General Motors and Chrysler twice that much.

Quite an impartial witness, isn't he?

A very disinterested, impartial witness.

And what is stranger than that, here is a lawsuit pending over three years in this court, it has taken us that long to reach this stage of the trial, we have gone through many proceedings in these past three or three and a half years preparatory to this trial, both in and out of this court. The trial is on four days and for the first time Mr. Eisenberg, the man who is ready, willing and able to come down for Ford at a moment's notice, he is called after four days following the onset of the case. And the case has been pending three and a half years. For the first, the very moment that Ford decides, "Maybe we had better call Old Eisenberg in from Rochester, we need some help. He is a metallurgist."

Now are you seriously going to believe that amongst

those thousands of engineers in The Ford Motor Company they don't have any metallurgist (1071) whom they couldn't have consulted?

The Ford Motor Company has been sued here for three and a half years, and from the very first day that the complaint was served, three and a half years ago, they knew what the case was about. They knew the plaintiff was charging them with a bad design and a defective metal.

Now are you going to believe that The Ford Motor Company in three and a half years and not until four days after the trial started never consulted anybody else about this?

Are you going to believe that?

Are you going to believe that a lawsuit which has been pending in the State of New York and which is defended by a law firm in the City of New York on behalf of The Ford Motor Company did not consult a large number of qualified metallurgists that Mr. Eisenberg told you are right in this area, not even one? In all these years?

Are you going to swallow the story that for the first time that any metallurgist was consulted was a few days ago?

Well, if they did consult other metallurgists (1072) in the last three and a half years in the New York area, why haven't they testified about their conclusions and opinions?

Maybe they couldn't get one to go along with them to the extent that Mr. Eisenberg would agree to do so, and they had to go for that reason at the last minute to Rochester to get him. Maybe that is so.

That is something to think about, isn't it? The Ford Motor Company waiting all this time to speak to a metallurgist when they knew all about the claim and they had

these pictures (indicating), and Mr. Morfopoulos admitted that as early as last February that these pictures were supplied to them, that they got them last February and that they even took the deposition of Mr. Morfopoulos at that time.

Would you swallow that and that ever since then they never consulted with a metallurgist, they never showed anybody the pictures, that they waited until Mr. Eisenberg came down from Rochester last Friday morning in the middle of this trial and for the very first time showed him pictures.

(1073) Do you think that is so?

Isn't it probable that the moment they got their hot little hands on these pictures they rushed them right to a metallurgist for an opinion, for some advice?

Wouldn't you have done it, wouldn't I do it, wouldn't Ford do it, and wouldn't an experienced law firm like Mr. Conway's who has years in this business, do it, forty years in this business?

If they did do it, then I wonder why those people who were shown the pictures didn't come in to testify.

Maybe they wouldn't go along. Maybe they wouldn't say what Ford Motor Company would rather they say.

Maybe they would corroborate Mr. Morfopoulos' description of what these pictures show, and therefore, "We can't bring them in, we will go to Rochester and get Good Old Eisenberg, he comes down for us every year anyway."

When he did come down, mind you, the very same day he is telephoned, he brings no equipment with him, not even a magnifying glass, and (1074) surely he must have known the problem that they were asking him to inspect.

He was going to look through the surface of a tank for pinholes, for corrosion, and that was going to be his opinion, did he need a magnifying glass, he knew what he was going to say before he got here. What does he have to bring any equipment for?

But I want to tell you for Mr. Fortunato's sake, thank God for Mr. Eisenberg, because he did on cross-examination say something that solved a very troublesome problem for me and one which may be even troubling you, and let us face it square right now:

The Ford Motor Company has taken the position that the missing piece makes our case a lie.

You have seen this (indicating) and you all have the right to examine it to your heart's content when you go to the jury room.

I think it is quite obvious that it has been cut open, and Mr. Morfopoulous told you why and why it was necessary to do so, in order to make the microphotographs that he inspected, and it is like the pieces of a jigsaw puzzle. I put (1075) this together, pasted it so it wouldn't fall apart and maybe lost another piece. Take a look at the size of the piece that is missing. It is half the size of an old three-cent stamp, and that piece was sectioned in several pieces so it could be cross-photographed in a microscope.

Do you know what we are dealing with in our office? Specks. I can't tell you where it is, if I could I wish to God I would. I don't know where it is. I never even—

Mr. Conway: Your Honor, I am going to object to Mr. Peters trying to get some testimony in at this point.

Appendix F—Summation of Plaintiff's Counsel

The Court: I think enough has been said on that, Mr. Potter.

Mr. Potter: The court is going to charge you that if we intentionally lost that piece so as to prevent you from seeing it, you may draw the greatest of inference from that until I tell you right now I want you to further that the court charges you against me if you feel that I or anybody from my office intentionally lost that piece—

Mr. Conway: This is objected to there is not one scintilla of testimony, and now Mr. Potter—

Mr. Potter: May I continue?

Mr. Conway: He is going to do something.

The Court: Please, Mr. Potter, let's get beyond that.

Mr. Potter: I may throw it out of court if it is not a matter of anybody's fault, regardless, throw it—

Mr. Conway: I object to this. There is no proof on this one way or the other except Mr. Potter unsupported, unsworn statement that he is now trying to make until object until limit. Your Honor, it is improper.

The Court: The jury will be told again to disregard statement of counsel with respect to whether or not the jury is to draw an inference.

Mr. Potter: Continuing: Let us see how important it is, see how important the missing piece is in light of the Mr. Bierstein's testimony. Let us see how important it is.

Let me recall this to you in that thing that is said on cross-examination when he was first shown the

Think about that for a moment. He has just told you by that that there was in fact a hole right there where the missing piece is because the rust proves it.

He doesn't then say there was no hole there. His argument is an entirely different one. He says that the hole that was there was not a hole due to a foreign object being stamped on it, but was due to pitting or corrosion by weather or moisture. Think about that.

He doesn't say any more no hole was there, he says the hole isn't the kind of hole we say it was. It was made by another cause.

(1079) Well, if he is conceding there was in fact a hole there, then what is all of the hullabaloo about? It is not whether or not there was a hole, but why the hole came to be. Ninety percent of the importance of the missing piece is now unimportant because we didn't need the piece now to establish that a hole was in it. He has admitted the hole was in it and he said the proof is the rust—and I didn't even bring that out, that was his opinion when Mr. Conway brought it out.

You may listen to his testimony again on that score if you so desire, if you don't believe me.

The very spot where we say a hole existed, he agrees there existed a hole. But out he comes and says, however, Mr. Fortunato, you are dead wrong as to why the hole was there, you are dead wrong on the fact that the hole was caused by foreign particles being imbedded in it, the hole was there for one reason, corrosion.

That is the issue he raises.

Appendix E—Summation of Plaintiff's Counsel

Let us examine his contention as opposed to ours, let us examine whether he is right or (1080) we are right as to why the hole was there. The hole being there is conceded, the only question now is, let's examine how it came to be there, from what cause.

He says that somehow or other on all of the surface on the top of that tank corrosion caused the hole to form this spot (indicating), and that water, moisture, or whatever, causes metal to rust.

He says this is undoubtedly true and it couldn't have happened any other way.

Well, let us examine that statement:

Isn't it strange that after only a few months corrosion caused a hole to appear on top of that metal.

How is it that after all of these years until last Friday morning when he looked it over he was unable to find one single totally satisfactory other hole caused by corrosion. And Lord knows, take a look at it and examine it, if you will, there is an awful lot of corrosion on there by now. Not one other hole. So if corrosion makes a hole so easily in a short time, if his explanation is so, how come there weren't (1081) any more holes?

Does that make sense, or did the hole come from the very method of their manufacture that we say it came from? And if they manufactured the top of a gas tank to form the bottom of the trunk, which is so weak as to cause corrosion to make a hole in such a short time, what the heck kind of design and what kind of material are they using anyway? If Mr. Eisenberg is to be believed, they are using a very bad design when corrosion, simple corrosion, can put

a hole in a gas tank and let fumes get into the car and that would be their responsibility, too.

Mr. Eisenberg cannot even say, expert that he is, what the rate of corrosion was to form a hole. He had no idea. And moreover, he admits this, he admits this, if The Ford Motor Company had improperly and inadequately turn-coated the top of that tank when they did it—

Mr. Conway: There is no such testimony or any indication of that, Your Honor, this is sheer speculation.

Mr. Peters: You may have that read back to you. You may have this read back to you, my (1082) cross-examination, if you don't believe me you ask to have it read back to you.

It is your recollection, not his, not mine. If you don't believe me, if your recollection is different, ask for it to be read back to you.

He said on cross-examination if it was improper or inadequately turn-coated, that might cause rust or corrosion to develop where it was improperly turn-coated. And the salt air in New York, the moisture laden salt air in New York is a good cause for metal corrosion. They are shipping their cars to Metuchen, New Jersey, the assembly plant, to be sold to areas in the New York area on the eastern seaboard. Have they got a duty to turn-coat properly so that corrosion doesn't happen?

Mr. Eisenberg puts a Ford in a very awkward position by his testimony. However, I don't think Ford is worried too much because Mr. Eisenberg didn't know what he was talking about because corrosion didn't cause all of that.

Now I said to him, "Can't the stamping process do it?"

Here is a man who drew a document on the (1083) board showing a condition, showing a condition where a foreign object gets on top of a plate and the die comes down and smashes it down into a stamp, and when you have a form this thick, and this is the way the die works, it comes down and bends the metal in this fashion (indicating), he described it with a diagram, and then he has the nerve to tell you it can happen—well, he qualified that by saying really, I never saw it happen—of course he never saw it happen.

(At this point the reporter was relieved.)

(1084) Well, he qualifies that by saying, I never saw it happen. Of course he never saw it happen. He doesn't have any field experience, he is a schoolteacher. He is a professor. He, in his qualifications, didn't tell you he had any skill or experience with this type of work. He was in no position to have ever seen it happen in a schoolroom, but what would you expect. He drew a description of a diagram that you cannot read. Even trying to get you to swallow, one time there, that cutting metal like this with shears is the same thing as embedding a foreign particle into a die. He tried to tell you that that was so. How far is he going to go for the Ford people?

And the last thing he did, he gave you a song and dance about flow lines. He says these lines don't correspond with what they should look like, this top, if it was embedded.

And what about the black part of this (indicating)? He didn't even know what it was. He admitted that he

ence in that trip, he (1088) found a muffler in the car which he placed on the ground, and then on the stand he was asked to draw a picture where it belongs on the car, and he did, and he put it there. What is it for? What is the purpose? Why did they go through all this? What are they wasting our time for? Is that why they brought him here, to testify that he found a muffler and this is where it belonged? Why did not he state to you people for your consideration what his opinion was and what conclusion he drew based upon his examination when he came to New York and looked at the materials? Why not? Surely, Ford sent him to New York so he could for an opinion and come to a conclusion.

He wasn't even asked by Mr. Conway what his opinion was. Why not? Maybe he doesn't want you to hear them. Surely, I can't think of any reason why he didn't have any.

And this other man, this other engineer I heard him referred to as Sompiki (phonetically spelled), I don't work for Ford and I didn't travel with him from Detroit, and spent a few days with him, so I don't know his name either. (1089) He didn't make notes either. Ford now has another man they sent to New York for the purpose of examining, forming conclusions, making findings. They don't even have him here so we could see him. I wonder what he found that they didn't want him to tell you about. I wonder what his opinion was about this gas tank. They could have brought him. I even know about him. And when Mr. Schlegel tried to tell you that all the Ford tanks were manufactured by Ford and by nobody else, and he tried to tell you that all the Ford tanks went through hundreds—went through this water test. And when I confronted them with

their own engineering specification, number one, their address, the vendors and suppliers, these are the outside company suppliers, vendors, people who sell to Ford; they don't make all their own parts.

Obviously, according to their own specifications it was their intention to have this tank made, at least in part, by outside vendors and suppliers.

Mr. Conway: Judge, there is no such (1090) testimony at all. He said the Mustangs were all—

The Court: I am sure the jury understands when the Court says statements of Counsel is not testimony or evidence, they will respect that.

Mr. Peters: Where did they prepare specifications addressed to vendors and suppliers giving instructions? How did the gas tank—if Ford was going to build them themselves, why did they address instructions to vendors and suppliers as to what kind of testing to do, if Ford did all the testing themselves? How come they told these vendors and suppliers they didn't have to do a hundred per cent tests, they could do random checks at their own discretion, if every tank was made by Ford and every tank was checked by Ford themselves? That's their own specifications; I didn't make them up. Those are Ford's papers.

And if Ford made every one of these tanks themselves, there are records that would confirm that beyond a shadow of a doubt. Who made them and when? They keep production records; (1091) why do they not have them if every unit was tested, every single one? They have unit control and testing records and quality control testing records. They didn't bring them. Where are they?

Mr. Walker, another Ford employee, they sent him here to sit in on the whole trial. He said he sat here from the first day listening to testimony. He was sent here by Ford for that purpose, among other things, to listen, I suppose, render what aid he could to their lawyers, perfectly good tactic. And he is a design engineer, he says. Fine. I said to myself, at last we are going to hear a qualified man on how wonderful a design it is. At last we are going to hear a qualified man say why Ford made the tank this way. At last we are going to hear a design engineer tell you why it wasn't hazardous. If you waited like I did, you are still waiting, you didn't hear it. The only design man they put on the stand, and he stayed away from the subject, and he stayed away from the subject like it was a hot potato.

Of all the questions put to him by (1092) Mr. Conway, not one had to do with whether the design was safe, whether it was hazardous, or anything about its development. He wasn't even asked to express an opinion, which he certainly would have been qualified to give. He wasn't even asked. Would you ask yourselves, why not? Maybe Mr. Walker in all honesty would have to say, it's not a good, safe design, I don't really like it. I think he would have to say that, because he was quick to point out at the very time he took the stand, "I didn't design this tank."

One of the first things he said, he disclaimed, "I didn't make this tank." Maybe that's why they didn't ask him to render an opinion. I was waiting. They don't want him because his opinion would probably be a little detrimental.

You don't have to be an engineer to know that when you make the foot of a trunk out of a thing like that carbon steel, call it anything you want, any puncture in there, that thing is going to let a terrible thing happen, gas fumes come out. We'll talk about that in (1093) a minute.

What did Mr. Walker tell you instead of telling you what he should have told you, being a design man? Since the whole crux is the design, that's the whole issue, what did he tell you? He told you there is a careful assembly line, it runs from here to here (indicating). There is a machine—it must be a marvelous machine, it takes the tank, it plugs up holes, it dunks it in some water for five seconds, and then, if there is a leak, it rejects it. No human being necessary, and a hundred per cent of every tank has to go through that.

Now, that might very well be true, the hundred per cent of the tank that Ford made, but how about the ones the outside suppliers made? They didn't have to—and if this is a tank that an outside supplier gave to Ford, it didn't go through that test. Think about that one.

Let's talk about the test. When I said to him, "Any leak?", well, he had used the expression, "those tanks were an acceptable rate of leak." Well, just think about the (1094) horrors of that statement for a moment. That means that when that tank goes through this wonderful test, it may have no leak at all—marvelous—or it may have a leak that is acceptable or unacceptable. What is an acceptable leak in a tank that is the floor of a trunk holding gasoline? Would you like one? Would I like one? I

don't think I would accept any. But of course the machine that makes the decision doesn't drive the Mustang away, and I would like to know on what basis and just how the machinery acts and is a judgment of what is acceptable in a leak of a tank of this design.

You mean a hole like this, will that get through, will it have to be a little smaller to get through? A hole like this, according to the experiment, will blow up that car in 15 minutes.

Acceptable? I don't think Mr. Fortunato would deem anything acceptable, and neither will I. I'll leave it for anyone else if they would, either.

As yet, this marvelous machine—and (1095) even more than that, if a tank has embedded in it a foreign particle solidly so it hasn't yet dislodged, and leaves the hole it will go through it at the time and pass with flying colors, so that test wouldn't help us at all in this case.

And what else did they ask Mr. Walker to do, and he is a very, very personable, a hell of a likeable guy, so they took advantage of that elegant personality. They had him draw a scale to show there was alleged so many inches longer, window dressing, because when I got up to ask him about it, I asked him, is it a fact that this length means there is no opening, he said, that leaves the open spaces. What is the importance of that? If the space is still open, even though that length is there and the gas vapor can get through, I don't care whether it is 3 or 19 inches, if it leaves the opening, that's sufficient to cause an explosion. I don't have to draw a color diagram. I don't have to put the window-dressing in.

And when I asked the man who described himself as a design engineer was he familiar (1096) with fuel tanks, presumably with the safety of fuel tanks, if he'd agree with me, properties of gasoline vapor, he says, I know nothing about gasoline vapor. Can you imagine that? He could have refuted, as a design engineer, this whole contention that this is hazardous and unsafe; he didn't say one single word about it, so I thought to myself, somebody else will come along, perhaps better qualified, and he will tell the Court and jury how safe and how secure and how this is not hazardous; we will hear it sooner or later, somebody has got to come.

And along comes Mr. Cook, and he appears to be a very qualified man, and the cat dropped right out of the bag, blew up the case right in their face with the experiment. Here is a man who is asked by his employer, Ford Motor Company, in the middle of a trial, to make an experiment which will help them beat the case if he can. This is what he said he was asked to make, an experiment, and he knew it would be used, if possible, in a lawsuit. And they told him certain facts.

(1097) He grooved a hole in a Ford Mustang gas tank top, presumably just where we say the hole was, and presumably the same size. This is a forty-thousand size that Mr. McFarbalis said—

Mr. Conway: He said it was half that size.

Mr. Peters: Grooved a hole, then they fill the tank with gas and they drive the car around the streets of Dearborn for ten miles because I guess Mr. Fortunate said he went to his sister, they were trying to duplicate the

trip. Then they did it with the seat down and then they did it with the seats folded back, and they did it with this beautiful mat in, and they did it with the beautiful mat out, and in every case he said there was no explosible mixture in there when he tested it.

What he didn't tell you until I got up to cross-examine him on it, in every case, despite the fact that he says there wasn't an explosible mixture, it was fill mixture, it just hadn't accumulated enough. He said he let the car sit for ten minutes with all the windows and doors closed, and this is the hot (1098) October sun in Michigan. And he says he checked the car after ten minutes and there was no explosive mixture. And he stopped and nobody asked him anything more.

I didn't know what to ask him. He seemed to be burying me. If he did all these things, how could Mr. Fortunato have had this horrible accident.

The first thing I found out, he didn't mean there were no fumes in there because the lower explosive limit is one and a half per cent; if ninety-eight per cent and a half, there's no air. If less than fuel vapor, it wouldn't explode. He didn't say there wasn't any, he says there wasn't enough. How much was there? Did you measure that? And that's when the cat came out of the bag. After only ten minutes, 86 per cent of the amount necessary to cause an explosion—fewer, he said, it wasn't explosive.

What he told you, he told you a half-truth which is sometimes worse than no truth at all. He didn't tell you about the 86 per cent until I asked him. He was forced to (1099) admit that after only a few more minutes, the

other 14 per cent that would have been necessary to cause the explosive mixture and would have blown him into the sky if he had used a cigarette lighter, 15 minutes altogether is all it would have taken.

So that when Mr. Conway told you in the opening how ridiculous it was to think it was—

Mr. Conway: The test we are talking about, I think Mr. Peters is mistaken—

Mr. Peters: He has had his opportunity to sum up. I don't think he should infringe on my time.

The Court: The jury will form its impression of the evidence as they know it.

Mr. Peters: Mr. Conway said in his opening, it is ridiculous that a hole like this could allow enough fuel vapor in a car to explode. The windows were closed and the doors were closed, that's true. How long had it been since that gas tank was filled by Mr. Fortunato, 15 minutes, 20 minutes, over 24 hours? You think there was enough time for him to pull that cigarette lighter out?

(1100) We didn't even see one single designer take the stand ever, from the time he rested, to tell you this is a safe design and not a hazardous one. We did not have anybody from the stamping department from Ford who would know stamping processes and actually did stamping or personally supervise it tell you that this type of defect couldn't take place, not a one. There must be—I'll be conservative—two dozen people in the Ford factory who could have been here to tell you. The fact that they didn't bring anybody to tell you it couldn't happen means that they couldn't.

Answer: Yes, sir.

Question: About how far behind the other vehicle were you when you first noticed it?

Answer: Approximately three car lengths.

Question: How many feet approximately?

Answer: About 60 feet.

Question: Was it going slower than you were going?

Answer: Slower than I was going.

Question: At any point about 60 feet behind you did you see the car veer to the left?

Answer: I was behind the car. We were proceeding northbound on Manhattan Avenue, the car going toward the curb veered to the curb, and proceeded into me.

Question: You said you saw the car about 60 feet behind you when this happened?

Answer: Yes, sir.

Question: Was your car still on the right part of the road?

Answer: Yes, sir.

Question: What about the other car?

Answer: It was on the right part of the road.

Question: How far approximately across the bridge was your car when this happened?

Question: Approximately more than half about three quarters?

Question: Was the car that hit happened to this [illegible] were you in addition to your car?

Answer: Approximately two car lengths in front of me.

"Question: Will you describe again what you saw happen?

"Answer: I was following behind him, suddenly the car just erupted into flames from the inside.

"Question: What do you mean?

"Answer: There was nothing burning outside the car, just inside.

"Question: You mean you saw flames only in the interior?

"Answer: That's correct.

"Question: Did you see any flames on (1104) the outside the car?

"Answer: No, sir.

"Question: Will you describe that you say took place after it erupted into flames on the inside?

"Answer: I was a little closer to him by this time he went into the turn, hit the right wall. After he hit the right wall, he bounced back, came to the left wall, that's where he stayed on the left divider.

"Question: Was he still going straight or was he turning when the flames erupted?

"Answer: Going straight.

"Question: As the flames erupted when the car entered the curb, which side did it hit first?

"Answer: The right side.

"Question: When the car came to rest was it still burning inside?

"Answer: Yes.

"Question: What did you do?

"Answer: I stopped my truck about ten feet away, put my lights on, ran over to the left-hand side door.

(1105) "Question: Were there still flames inside?

"Answer: Yes.

"Question: Was any part of the outside of the car burning at that time?

"Answer: No, sir.

"Question: So all the fire that you saw was where?

"Answer: Inside the car.

"Question: Did you see anybody in that car?"

He goes on to describe the screaming Mr. Fortunato was doing, and how he opened the door and dragged him out, with handfuls of skin coming off.

This man is vilified and sarcastically asked, "Were you even there?" He said he doesn't even believe he was there, and he put a policeman on the stand. He says Comparato was a liar, a percentager, because he's lying, he didn't pull out of the car. He wasn't there. He didn't see what he saw. That's what Mr. Conway has charged.

He put the policeman on the stand, and the policeman testified—I bless my lucky stars again that I know police officers are required (1106) to carry a memo book. You didn't know that fact, and you didn't see that memo book. When he was on the stand I asked him to produce it, and low and behold, what does the memo book say. And this is the memo book he made right at the scene of the accident. He has not only the fact that Mr. Comparato was there, he has his name, he has the fact that Mr. Comparato pulled him out of the burning car, and he has the additional fact that Mr. Comparato turned over the police officer—this thief, crook and percentager turned over the police officer $37.84, a gold wristwatch and a wallet. And this is the man who came into Court and

lied. If he pulls a man out of the burning car, as the police officer himself has in his own memo book—he couldn't have come sooner. If Mr. Fortunato had been in that car one more minute, I don't think he would be in Court today. He must have seen the whole thing and ran over and pulled him out, and obviously he is not a phoney, a fraud, a liar, a cheat or a percentager, and I don't know how much Ford would like to erase him from this case, they can't do it.

(1107) Unless that memo book had not come out, there may have been a terrible miscarriage of justice here.

Now, we had an obligation in presenting the case to you to prove what we said about the design and about the defect in the top of the tank. I know the time is going on and it's getting to be one o'clock. I am aware of it. The clock is behind my back. I don't blame you. I am going to try and hurry along. We have waited three and a half years to come to trial. Give me a few more minutes, okay?

We had an obligation to produce the best testimony we could to tell you what our case was about. We knew we were dealing with a technical subject, metal, gas, so we went first to Professor Daniel O'Connell at Columbia, who was not a professional witness like Mr. Eisenberg, and his integrity was not attacked. Mr. Conway didn't even attempt to impeach his credibility or his professional standing. He wouldn't even ask him if he has a court record. He is well qualified in vapors, and we knew we had a fire problem, and the question was, why a fire on (1108) the inside of a car after a cigarette lighter was

pulled out. We suspect that it's a vapor problem, but how do we know, so we asked a man who knows it, not in Rochester, here in New York. That's where we are. That's logic. We don't run around the country for somebody you can buy. You get the best man available to you, we bring him in, and he examines the car and, knowing its a problem, a fire problem, he looks at the gas tank and he sees a hole—and by the way, this hole is not so invisible.

Parenthetically, when you take this picture into the jury room, there is a white piece of paper that Mr. McFarbalis placed around the hole before he cut it out. I don't have the best of eyes, but I can see the hole and I could see it with a magnifying glass. You have a right to that. If you need a magnifying glass, I am sure the Court would not be averse to supply one to you. There is a hole. And this is a small picture. He saw the hole and he recognized, as he told you, that this could very well have explained this, but not being a professional metallurgist, he suggested that we get one so (1109) we could determine something about the hole, because before you could come to any conclusion as to whether it had anything to do with the fire, we had to find out when it was there, how it got there. So he suggested we get a metallurgist.

Whom did we go to? We went to the American Standard Testing Bureau, here in New York. When Mr. McFarbalis was on the stand and he gave his qualifications, he was never challenged, not one objection was made by any question or innuendo, that this testing bureau is not one of the finest in the whole country. They come into court only once a year. This is an impeccable organization.

If there was any objection, you would have heard about it. Dr. McFarbalis, because he has impeccable credentials from the United States Steel, Purdue, steel research, scientist with the Atomic Energy—without going into all details.

You remember what he said. I don't have to repeat it to you. I could read you his testimony. I have it here. I bought it from the court reporter. And I could read to you (1110) what he said. What he said, basically, to save a few moments, he said this piece of low carbon steel metal goes through a process in its manufacture when they make the tank or fabricate the tank. It is two pieces welded together. It's a piece of flat steel, and it goes through a die-stamping machine, and it's stamped out under pressure into the shape they want it; it's a very simple process. However, in such a process, if a piece of foreign matter gets between the top of the metal and the die that comes down on it, whether it comes down on it or hits it from the side, if such is the case, depending on the nature of that foreign particle, if it was dust, it would be nothing; if it was a piece of stray metal, it would be embedded by the die into the surface of the tank. This would case a defect in the surface if it was a large enough piece. It would, if it was big enough, it might puncture it all the way through, or it might go all the way through a large area. And then, during the handling of the tank or vibration of the use of the car it could be worked loose ultimately leaving the (1111) hole it made.

Now, he undertook to see if he could find out whether this was so or whether it was something else. The only

way he could do it was to cross-section it and take micro-photographs. The naked eye told him nothing. He needed a special camera, and so he did just that. He made those pictures which are in evidence, and he described them.

Now, here's the important part. He told you that there was an unusual feature about this hole which enabled him—first of all, it has these two points, these two structures, in the micro-photograph which seem to come roughly like square points, and they actually represent—now, this is hard to visualize because it's not a picture, it's a cross-section. I don't really understand it myself, to tell you the truth, but it's a that one gets when one cuts across and mounts it laterally, and this is actually an impression left by the object that was there.

What does that mean? When you walk along a beach, as you walk you leave footprints, you (1112) leave footprints in the sand. When your foot moves, you leave the print there, and you walk away. If somebody comes by later, they could look at that footprint, they could tell that a person was there. Mr. McFarbalis tells you that's exactly the thing he did here. These things are not comparable to low-carbon steel; they could not be what the low-carbon steel would like by itself. So it had to be another object which had been there and had left the imprint of its shape, plus forty times enlarged, and this was the foreign particle. It was proof positive that it left its mark even though it had been vibrated loose or corroded loose, and it could have only got embedded in the steel operation either in the rolling process when the steel was manufactured, or in the stamping process when the thing was made.

Now, this defect might have proven inconsequential in a different gas tank. Unluckily for Mr. Fortunato, it allowed fill vapor to come right out in the car. If it were a suspension-type gas tank or strapped in, it wouldn't happen because there is a space between the top (1113) of the gas tank and the bottom of the trunk, so if the top of the gas tank is punctured, it would go out just through the air, but that's not what Ford chose to put on the market.

The inside of the car he found completely gutted by fire and, interestingly enough, and important, most of the fire seems to have been concentrated, the damage of the car, the dash board area in the front, that's where most of the severe damage is. Also the entire interior. And if you're trying to figure where this explosion took place and whether it happened with the cigarette lighter, ask yourselves this question: Where were Mr. Fortunato's most severe injuries? This hand holding that cigarette lighter, that shows you a great deal. That's the part of the body that was burned more than any other part.

I asked a Mr. Goy, from the U.S. Army Department of Engineers, to come up here from Washington because I learned certain facts during the course of my inquiry. He told you—and, by the way, he had no axe to grind—I don't think you could ever imagine Mr. Goy or (1114) the United States Army Department of Engineers ganging up on Ford. Mr. Goy came up here from Washington, D. C., from his office as the assistant to the Chief of Safety for the United States Army, with forty years of background in this type of safety work, including air-

craft fuel, gas explosions, things like that, came up here from Washington to tell you, because of certain occurrences his superiors in the Army Corps of Engineers asked him to make an investigation into Ford Motor Company cars that they had with this sort of design, and he proceeded to do just that. He proceeded to make that investigation of Ford Fairlines which the Army purchased from the Ford Motor Company—lest there be any confusion, it is by now conceded and accepted, by virtue of their own witness's testimony, the gas tank in the Ford Fairlane and in the Mustang, with respect to this feature is, the same.

Mr. Conway: That is not the fact. There is no proof on that.

Mr. Peters: Shall I ask you to recall Mr. Gorker's own admission that this is used in the Fairlane, the Mustang, the Falcon—(1115) as a matter of fact, even their own assembly, where it has Mustangs, and Gorker said, with respect to this feature, it's a drop-in feature. The feature is the same. This is what Mr. Goy told you he was investigating. He was told to look into this particular problem—mind you, he's not on anybody's side, he's not about to take the stand and perjure himself for anybody's benefit. And this is what he told you. I'll read it to you, because I don't want you to take my word for it.

"Question: Mr. Goy, had you made any observations with respect to this type of gas tank design?

"Answer: I made an observation in writing.

"Question: Without going into the writing, sir, have you made observations concerning this design feature?

"Answer: Yes.

"Question: Do these observations relate to the hazard or safety in any way?

"Answer: Yes, they do.

"Question: What observations have you made?

"Answer: My observation was that this is (1116) an extremely unsafe design.

"Question: For what reason?

"Answer: Any hole in the gas tank will allow fumes to enter the trunk and it would be

"—he used an expression which is somewhat inflammatory. This is from the U. S. Army, not Mr. Fortunato's lawyer, not anybody that I hired to examine the car. It's worth a little consideration. And it was, incidentally, not made because of this accident. He didn't make test investigations because of our client.

Professor O'Connell told you, and I needn't go over the whole thing with you, I think you pretty well understand by now what happens when three and a half times heavier-than-air gas vapor escapes into a car where there is no separation or prevention to prevent it from escaping into the passenger part—highlights of it. I wouldn't read it to you, but I would like to call your attention to the figures, which are a little startling. They are absolutely, fantastically startling. And startling and fantastic as they are, they were not challenged. If he was wrong, you would have heard about it.

(1117) Listen to what he said. Listen to these numbers. How startling.

"Were you able to determine from that"—and this is after he measured the dimensions of the Ford Mustang.

Appendix E—Summation of Plaintiff's Counsel

"Question: Were you able to determine from that how much gas vapor, fuel vapor, it would take before you would have an explosive mixture of at least one and a half per cent?

"Answer: One-tenth of a cubic foot of gasoline vapor is enough.

"Question: One-tenth of a cubic foot of gasoline vapor?

"Answer: Of gasoline vapor.

"Question: How much liquid gasoline would it take to produce one-tenth of a cubic foot of vapor?

"Answer: One-half of one fluid ounce."

Does it make your hair stand on end when you look at that tank? If he was not being accurate, you would have heard a parade of witnesses to tell you something. He wasn't even cross examined on those figures because they are scientifically unassailable, and who should (1118) know it better than a man who puts a car on the market.

As Mr. Conway says in his opening, we will prove to you it's a beautiful design. Six weeks this man observed this car, one thousand, eleven hundred miles, he managed to put on it. Sure, they give him a cigarette lighter, beautiful, knowing they didn't charge him a thing for it. It was standard equipment. But they didn't give him a gas tank that was safe. They come in here and talk about mufflers, the hot sun in October in Michigan.

First of all, why did he do it and take a look where they put the muffler. They stuck it right next to the fuel tank. Do you know how hot a muffler gets? What does the muffler do? This man is driving with a gas tank that acts as a percolator. We don't need—we've got a nice hot muffler right next to it. So they come

in and they say he was drunk. Let's face the facts. I brought it out because I knew he would. Take a look at the hospital record. The man is in the emergency room three hours. I don't know how much blood and fluid (1119) is being pushed into him, or morphine. He is there almost three hours, and not one single doctor in that emergency room ever made an entry that would even suggest he was drunk, and if you imagine what his condition was, anyway, can you imagine what it must have been like in that emergency room, having just gone through what he had. And after three hours of all this treatment, including an examination by a neurologist, they took him up to the intensive care unit, and some young intern writes, "Drunk." I can't explain it, honest to goodness.

(1120) Mr. Peters: I can't explain it, honest to goodness, there is nothing in the record—

Mr. Conway: Your Honor, not of the intensive care, I submit—

Mr. Peters: I will read it to you and show you that you don't know what you are talking about.

Don't kid me, Buster.

You don't think it was done after he got to the intensive care room. Well, listen to this:

"Patient entered emergency room and intensive care unit conscious and drunk."

He left that out when he read it, "intensive care unit." That is a pretty nice trick.

So three hours later, having gone through what he had, some young intern, and it is labeled "Intern Notes," well, I guess he made him walk a chalk line or a track or did a blood test, or just as simply as this, maybe he said to him, "Sir," or "Mr. Fortunato," or, "Kid," or whatever he called him, "have you had anything to drink?"

And Mr. Fortunato said, "yes."

Or, "Were you drinking?"

(1121) And Mr. Fortunato said, "Yes."

Because that was the truth, he did have some drinks and the intern wrote "drunk."

Then on the basis of that little sketchy episode Mr. Conway would like you to throw him out of court, and he says to you, "Don't give a verdict to him because of sympathy, don't do it," he said.

You know, I put these pictures in evidence (indicating). Did you wonder why I didn't show them to you? Because it wouldn't have been fair to him, it wouldn't have been fair to him. Well, he showed them to you.

Yes, you will have to look at them to evaluate them, but I didn't want to wave them at you because I wanted you to decide the liability on its merits.

My gosh, it is 1:25 already and I haven't talked about his injury and I must, and I must.

Then again maybe I can cut it short because I know my colleagues at the bar would hate this.

You are intelligent people, I don't have to wave his injuries around your faces, I don't (1122) have to go into all the things that I could say for an hour.

get along, they make a little more from time to time—well, I don't know how you are going to compute it, but if you believe that his earning capacity has been impaired, and I think you must undoubtedly come to that conclusion, you must award him, if you feel that he is entitled to a verdict, not only the medical expenses of $51,000 and lost earnings of $15,000 to date, but whatever amount you feel he will have lost for his inability to work for the remainder of his working life, and it is for you to say, I can't tell you, be reasonable, be fair, don't go overboard, but don't go under, and that is the only way I can say it: Don't give him anything more than he is entitled to, don't give him any less.

You are talking, believe it or not, in terms of thousands of dollars. You don't realize how much money you earn in the course of a working life even at $100 a week. (1126) Think about it, if you are twenty-five years old and you work until you are fifty-five or sixty, you have worked thirty-five years, and if you never get a penny of a raise over that, do you know how much money you earn, $5,000 a year, well, it is almost $160,000. It goes, you never see it, it goes away, but you earn it.

He won't.

I don't know what future psychologically there is, I wish I did and maybe again I wish I don't. I am glad I don't.

We do know that Dr. Marks, who incidentally, for heaven's sake, must we brand him a liar, must we call Dr. Marks a liar, too because Dr. Marks said he told him what the voices said to him and he told Mr. Conway he didn't know what it was—I mean—O.K., they want to win the case, anything but lose it.

Appendix E—Summation of Plaintiff's Counsel

Dr. Marks told you that it will take at least another couple of years, three years, perhaps, and we are going to treat him on a regular monthly basis. He was honest enough to tell you that he was not in a position to know what his (1127) future holds. That nobody can. But he has to take some massive dosages of medication to this very day and will continue to have to take them probably for the rest of his life. I can't remember the name of the drugs, perhaps some of you do, but as he indicated, large doses of tranquilizers.

I don't know what they cost and I don't really care what they cost. Having to take them is enough as far as I am concerned.

Now that is the smallest part of the lawsuit, these expenses, these out-of-the-pocket expenses which come to almost, I don't know, I would estimate $150,000 for prospective lost earnings.

I am talking numbers and they sound big and they are big, and as a matter of fact, in this part of the case we are talking about over $200,000 in out-of-pocket expenses over the rest of his life, and we are not talking about the main part of the case because the other aspect of damages, as the judge will tell you, if he is entitled to a verdict, and he is entitled to be awarded at your hands whatever you think is (1128) fair for the pain and the suffering and the disabilities and the discomfort, not only which he has suffered from the day of this accident to this moment, but what he will suffer from that day for the rest of his life, because the proof is that his problems are permanent, and permanent means for the rest of his life.

What are his problems? Well, without going—I think you can well imagine, without my having to be graphic about them, what he has gone through up until now.

If you were to take the trouble and you had the stomach to go through the hospital records, you would find, you would find like seven months of massive infection which we didn't even talk about, huge rashes because he was allergic to medication which they had to give him for the infections.

Heart problems developed as a result of an attack of acardia. He recovered from that, it is all in there. The months and months of constant pain recorded in the nurses' notes and the doses of medication that they gave him, and this is day and night.

(1129) The infections and the serious wounds caused other major problems in his body, his lymph glands became pathological, they had to treat that, his blood supply and the twenty-eight blood transfusions during the first eight days. The electrolytes of his body, the content of his blood supply became altered and had to be treated, his whole system, as the hospital record says, was affected.

I didn't even bring it up because it is in the record and what point would it serve in our case? But you should consider these things for what he has gone through until now.

The doctor gave you a glimpse into the pain aspect of the operations. These are painful operations, not when you are having them done, you are under anesthetics, it is when you come out of it.

All of the joints of his fingers of his right hand were destroyed or deformed, and they had to be operated on,

one by one and put in some semblance of order so that he could do something more useful other than being a lump of burnt flesh.

(1130) They did eight—seven—I think eight operations all told on this man over a period of eleven months, over a two-year period, eleven months of hospitalization spread over two years. He got out in May 1969, that is when he got out last.

They have done all they can for him. He is left necessarily badly scarred.

His hand is at best, to stretch it, practically useless for all practical purposes. Yes, he uses it as an assist. He can write after a fashion, but it cramps, it pains, and the little things, you know, the little things you don't even think about, the itch, his scars itch him all the time.

Yes, Mr. Conway sought to make believe that because the doctor said when they graft skin on there is no nerve supply and the skin itself is different that there is no sensation of itch, but it is very common, and the doctor said it is not at all uncommon.

This is what he lives with for the rest of his life, so you are entitled to award him whatever sum you think is fair, not what I think is (1131) fair but what you think is fair, considering all the circumstances and what he has suffered from that day of that fire to this very day, and then consider an additional sum if you feel he will continue to suffer for the rest of his life with these complaints, whatever you think is fair for that, too.

So you have got up to now and then you have the future, and I wouldn't suggest a figure to you, and that is why

we have human beings on the jury. You can't ask a machine to award amounts for sums for pain and suffering, machines don't suffer. Only you can be fair.

Let me say this in closing:

What could Ford have done to avoid all of this suffering? Let me tell you what Ford could have done:

No. 1, is the obvious one, they could have used the trunk tank design that General Motors or Chrysler used so that this couldn't happen.

Mr. Conway: There is no such proof that Chrysler or General Motors used a different type of tank.

The Court: As I said, Mr. Conway, the jury—

(1132) Mr. Conway: It is an unfair statement.

Mr. Peters: Well, his own witness said so, for heaven's sake, his own witness said so and used to work for Chrysler and General Motors, he said they used essentially the same type thing, that this tank was adopted as a warmed-over design from the old Falcon. He didn't want to admit that at first, I had to read it and he conceded that the Ford Company did admit that it is a warmed-over design from the 1960 Falcon.

I wonder why Ford insisted on using this, it certainly wasn't because it is safer.

I think there is only one obvious answer:

It's to save money.

Mr. Conway: There is no proof of that either, I submit.

Mr. Peters: It is a fair inference, Your Honor.

The Court: It is fair comment.

Mr. Peters: Thank you.

Obviously if you can use one piece of metal for two uses, two purposes, you are going to save a few pennies. Maybe even a few dollars, I don't know.

(1133) So the consideration for Ford was not safety of the public, it was profit. A little more profit makes for happy stockholders.

If they insisted on using this design, they still could have done something to help the situation. They could have, No. 1, put some vents in the trunk, put some vent holes in the trunk compartment so in case some gas gets into the trunk, gas vapors, they can escape out into the air and not go into the passenger compartment.

If they didn't want to put vent holes in, if they didn't want to do it, they could have done one other thing, they put a fire wall in the car between the engine and the front seat, so why couldn't they have put a fire wall between the trunk and the back seat?

How much would it cost?

That is where the hazard is. The engine isn't going to blow up, it is the gas vapor that is explosive if ignited.

Put a fire wall back there.

I don't know how much it would cost, can't cost much, put something there to prevent these (1134) vapors escaping from the trunk which get into the passenger compartment, but I guess it would cost a little bit.

Or they could certainly have tested things a little more than they did because here is a curious feature, we learned about one test, one test, and that is done long before that test is put in the car.

Do you know what a tank goes through between the time it is—

The Court: I think I am going to have to suggest that you have five more minutes.

Mr. Peters: I will finish easily.

Not one test has been testified to by any Ford man, not one single test that was performed on this tank between then and the time it is shipped to Metuchen, New Jersey and finally gets installed in the assembly plant, the car itself is not even tested once, you heard no testimony at all from anybody, from Ford, that they even tested it one more time in any way, in any way.

They didn't even take a good close look at it, nobody says they do, and it gets some abuse in shipping, traveling and storage and handling.

(1135) They certainly could have issued a warning to the owners in their manual anywhere, "Hey, driving a car with this tank, be careful, look at it once in a while."

They don't tell you anything.

What a shame that the experiment that Mr. Toft did to indicate how explosive this design is wasn't done long before they placed it on the market.

Why, what a shame they waited to do the test during this lawsuit.

If they had done that little experiment in 1960 or 1964, whenever this thing was designed, we wouldn't be here. They wouldn't have put it on the market. At least if they had any concern for our safety they wouldn't put it on the market.

I am telling you in closing only one thing.

It is apparent to me that The Ford Motor Company is somewhat more interested in fact in profit rather than

the public safety, and I tell you this cannot continue and I think it is about time the customer had a few rights and I would like The Ford Motor Company to be a little more careful, if this is hazardous not to consider (1136) a profit over safety.

And I say to you if you feel that way about this design, you let The Ford Motor Company know it and let them know—

Mr. Conway: I think this is way, far beyond the realm of any sort of comment.

The Court: I think you have concluded, you have concluded?

Mr. Peters: I have just a little more.

If you feel that way about this design, you let them know it and you let them know it loud and clear.

Thank you.

The Court: Well, ladies and gentlemen:

I regret it was necessary to intrude on your lunch hour, but this is a procedure which requires continuity.

I am going to suggest that we recess now until 3:00 o'clock.

Is that agreeable?

At that time it will be my turn to talk to you awhile about the law.

All right, see you at 3:00.

Mr. Conway: Your Honor, may I see you (1137) before you go?

The Court: Take the jury out.

(The jury then left the courtroom.)

Mr. Peters: I am going to put all the exhibits—

Mr. Conway: Your Honor, in view of Mr. Peters last bit of summation where in effect he was asking for punitive damages, I am moving for the withdrawal of a juror.

The Court: I am going to deny that, Mr. Conway.

Mr. Conway: Exception, sir.

The Court: If you wish, I will explain to them that there is no claim for punitive damages in this case.

Mr. Peters: I don't think that is necessary, I haven't asked for it. I asked them as a matter of fact only to give what they consider fair and reasonable.

Mr. Conway: They have asked to punish Ford, that is the reason—

Mr. Peters: I did not.

Mr. Conway: (Continuing) That is the reason that I ask for the—

(1138) Mr. Peters: I said if they feel this design is hazardous, then by their verdict let Ford know about it, their verdict on liability, obviously.

The Court: I am going to deny your motion.

Mr. Conway: Exception.

The Court: I will consider whether or not there is any requirement for some corrective instruction.

I might say, incidentally, in view of Mr. Peters' use of the footprint analogy that I am going to read that sentence about Robinson Crusoe. Somebody might misconstrue that as an identification of the court with the plaintiff's case.

All right, gentlemen, I will see you at 3:00 o'clock.

(A recess was then taken.)